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Supreme Court, U.S.
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No. 99-____

IN THE

# Supreme Court of the United States

COMPETITION POLICY INSTITUTE,

*Petitioner,*

v.

U S WEST, INC.,

*Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

## PETITION FOR WRIT OF CERTIORARI

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February 28, 2000

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## QUESTIONS PRESENTED

1. Whether rules promulgated by the Federal Communications Commission ("FCC") requiring local telephone companies to obtain affirmative customer consent before using or disclosing customer proprietary network information ("CPNI") restrict protected speech under the First Amendment.

2. Whether the court of appeals improperly rejected the governmental interest in protecting customers' privacy interests in their CPNI, given the specific congressional mandate for protecting the privacy of such data in Section 222 of the Communications Act of 1934, as amended, 47 U.S.C. § 222.

3. Whether *Chevron* deference is owed to administrative agencies on review of agency orders where the underlying statute presents a potential constitutional question.

## LIST OF PARTIES AND AFFILIATES

Pursuant to Supreme Court Rule 29.6, Petitioner states as follows:

The Competition Policy Institute ("CPI") is an independent, non-profit organization that advocates state and federal policies to promote competition in telecommunications and energy services in ways that benefit consumers. CPI is advised by a board of consumer representatives from around the country and receives financial grants primarily from new entrants in the market for local telephone service. CPI has no parent companies, subsidiaries, or affiliates.

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U S WEST, INC.,

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On Petitions for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

## PETITION FOR WRIT OF CERTIORARI

The Competition Policy Institute ("CPI") submits this petition for review of the judgment of the United States Court of Appeals for the Tenth Circuit.

## OPINIONS BELOW

The initial order of the Tenth Circuit vacating the CPNI rules of the FCC issued August 18, 1999 in *U S West v. FCC*, 182 F.3d 1224 (10th Cir. 1999) (reprinted at Pet. App. 1a-54a). The court of appeals' order denying CPI's petition for rehearing was issued on November 30, 1999 and is reprinted at Pet. App. 90a-92a.

## JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254 (1).

## STATUTORY PROVISIONS INVOLVED

The text of the First Amendment to the Constitution of the United States of America appears at Pet. App. 93a. The relevant portions of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, appear at Pet. App. 94a-102a.

## STATEMENT OF THE CASE

This case requires Court review in order to clarify the proper role of the federal courts of appeal in assessing rules promulgated by an administrative agency in accordance with its plenary jurisdiction granted by congressional statute. The court of appeals has misapplied the First Amendment to agency action that does not restrict speech. Further, the court has confused an Administrative Procedure Act challenge to agency rules with a *sub silentio* constitutional attack on a valid congressional statute, thereby obliterating Congress's judgment that personal privacy in today's "information age" requires that so-called Customer Proprietary Network Information ("CPNI") should not be used or disclosed without a person's approval. The court of appeals' decision raises core issues of separation of powers among the legislative, executive and judicial branches of the government and will have far-reaching consequences for judicial review of federal agency decisions. The court of appeals' judgment represents such a serious departure from the settled judicial role in administrative review that certiorari is warranted as an exercise of this Court's supervisory powers.

***Section 222 — "Privacy of Customer Information"***

The Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.* (West Supp. 1998) (the "1996 Act"), is a sweeping legislative effort by Congress to create a "new model" of telecommunications regulation, H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. at 121, with the express purpose of "shift[ing] monopoly markets to competition as quickly as possible," H.R. Rep. No. 104-204, 104th Cong., 2d Sess. at 89. Included in the 1996 Act is Section 222, which enacts statutory restrictions on the use of CPNI — data regarding a customer's account and usage — by telecommunications carriers. 47 U.S.C. § 222 (Pet. App. at 95a-98a). Section 222 restricts both the disclosure of CPNI to third parties, *id.* § 222(c)(2) (Pet. App. at 95a), as well as the manner in which a carrier may use CPNI for provision and marketing of its own services, *id.* § 222(c)(1), (d) (Pet. App. at 96a). As with other provisions of the 1996 Act, the FCC is authorized to promulgate rules implementing Section 222 that further define and regulate use and disclosure of CPNI. 47 U.S.C. § 154(i) (Pet. App. at 94a). *See AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 730 (1999).

Section 222 provides that "every telecommunications carrier has a duty to protect the confidentiality of proprietary information of . . . customers." 47 U.S.C. § 222(a) (Pet. App. at 95a). In the 1996 Act, Congress established specific guidelines for permissible use of CPNI.[1] *Id.* § 222(c)(1)–(3)

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[1] The Act defines CPNI as "information that relates to the quantity, technical configuration, type, destination and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by

*footnote continued on nextpage*

(Pet. App. at 95a-96a). A telephone company may "use, disclose or permit access to individually identifiable [CPNI]" only in providing "the telecommunications service from which such information is derived" or "services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories." 47 U.S.C. § 222(c)(1) (Pet. App. at 95a). Most importantly, Section 222 provides that telephone companies must obtain customer "approval" prior to using CPNI for any purposes other than those expressly permitted. *Id.* § 222(c)(1), (c)(2), (d)(3) (Pet. App. at 95a-96a).

This framework — restricting use and disclosure of CPNI on an intra-service, or same-service, basis — represents Congress's resolution of the competing interests involved in CPNI. Congress sought to balance carriers' ability to compete in new services with customers' rights to prevent disclosure of sensitive information. As the House Conference Report makes clear, "the new section 222 strives to balance both competitive and consumer privacy interests with respect to CPNI." H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. at 205.

***Agency Implementation of Section 222***

Though Section 222 is a recent addition to the Communications Act, the FCC has regulated the use and disclosure of CPNI since prior to the divestiture of AT&T.[2] With the

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the customer solely by virtue of the carrier-customer relationship." 47 U.S.C. § 222(f)(1) (Pet. App. at 97a).

[2] In a series of decisions commonly referred to as *Computer II*, *Computer III*, *GTE ONA* and the *Bell Operating Company CPE Relief Orders*, the FCC created CPNI rules that were intended to prohibit

*footnote continued on nextpage*

passage of the 1996 Act, the FCC began a separate investigation of Congress's mandates in Section 222 in response to industry requests for guidance on the new provision. On May 17, 1996, the FCC released a *Notice of Proposed Rulemaking* requesting comment on which entities are bound by Section 222 and what constitutes customer "approval" for the use and disclosure of CPNI. After releasing an initial order and a request for additional public comment, the FCC issued its *Second Report and Order and Further Notice of Proposed Rulemaking* on February 26, 1998. *Implementation of the Telecommunications Act of 1996*, 13 FCC Rcd. 8061 (1998) ("*Second CPNI Order*") (Pet. App. at 55a-89a) (excerpts).

In the *Second CPNI Order*, the FCC adopted what it termed a "total service approach" to regulation of CPNI. 13 FCC Rcd. at 8081 (Pet. App. at 79a). Because Section 222 provides that a telecommunications carrier may use CPNI only "with the approval of the customer," the FCC interpreted the statute to mean that "approval" requires the affirmative, express consent of the customer prior to carrier use or disclosure of CPNI for purposes other than those expressly permitted. The FCC concluded that this framework "best protects customer privacy interests, while furthering fair competition, and thereby best comports with the statutory

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AT&T, and later the Bell Operating Companies ("BOCs") and GTE, from capitalizing on their incumbent status by using CPNI generated from traditional telephone service to gain a market foothold in newer telecommunications services, such as data transmission and voicemail. *See* 13 FCC Rcd. at 8069 n.31-32 (Pet. App. at 64a-65a) (collecting citations). These rules restricted AT&T and the BOCs from using telephone service-generated CPNI to target existing telephone customers for unsolicited marketing regarding new telecommunications services. These pre-Section 222 CPNI restrictions remain in effect.

language, history and structure of section 222." 13 FCC Rcd. at 8084 (Pet. App. at 79a).

The FCC considered and rejected an "opt-out" approach, under which there would be a presumption of customer consent unless the customer expressly acted, after carrier notice, to block use of CPNI. *Second CPNI Order*, 13 FCC Rcd. at 8128 (Pet. App. at 82a-86a). The agency reasoned that the statutory bar against use or disclosure of private customer information absent "customer approval" warranted a rule that permits customers to restrict use of CPNI at their option. *Id.* at 8131 (Pet. App. at 86a-87a). Further, the Commission found that customers "may be unaware of the privacy protections afforded by section 222, and may not understand that they must take affirmative steps to restrict access to sensitive information." *Id.* Thus, the FCC concluded that "it [is] difficult to construe a customer's failure to respond to a notice as constituting an informed approval of its contents," and accordingly adopted "a mechanism of express approval." *Id.*

***The Court of Appeals' Decision***

U S West filed a petition for review of the *Second CPNI Order* on May 18, 1998, contending that the FCC's "opt-in" rules violate the First and Fifth Amendments to the Constitution. Claiming that restrictions on CPNI interfered with its right to engage in targeted direct marketing to its customers, U S West argued that CPNI is protected constitutional speech and that the agency's rules did not meet the "commercial speech" requirements of *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York,* 447 U.S. 557 (1980). According to U S West, the "practical impact" of the CPNI rules is to prevent speaking to

customers "on an individualized basis," an action tantamount to a restriction on speech altogether. 182 F.3d at 1243 (Pet. App. at 42a). *See* U S West Reply Br. at 6.

Without addressing this purported "practical impact" of the FCC's rules, the court of appeals vacated the *Second CPNI Order* in a 2-1 decision. The majority opinion assumes, with little analysis, that the CPNI rules interfere with constitutionally protected speech. Analogizing to *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995), where this Court overturned a statute barring targeted direct mail by personal injury attorneys, the court held that the CPNI rules are a restriction on "targeted speech." The court of appeals did not reach the Fifth Amendment issue. Judge Briscoe, in dissent, wrote that the court's analysis is "frustratingly vague" because the *Second CPNI Order* "does not . . . directly impact a carrier's expressive activity." 182 F.3d at 1244 (Pet. App. at 44a).

The court of appeals vacated the *Second CPNI Order* on the theory that the privacy interest relied on by the FCC is not, standing alone, a substantial state interest that satisfies the *Central Hudson* standard for restrictions on commercial speech. The court concluded that "[n]either Congress nor the FCC explicitly stated what 'privacy' harm § 222 seeks to protect against." *Id.* at 1235 (Pet. App. at 21a). Further, the court expressed "doubts about whether this interest, as presented, rises to the level of 'substantial'" under *Central Hudson*. *Id.* (Pet. App. at 21a-22a).

The majority reasoned that the agency was required to provide "empirical explanation and justification" showing that "dissemination of the information desired to be kept private would inflict specific and significant harm on individu-

als." 182 F.3d at 1235 (Pet. App. at 22a). Finding that the FCC "fail[ed] to adequately consider an obvious and substantially less restrictive alternative, an opt-out strategy," *id.* at 1238 (Pet. App. at 34a), the majority held that the CPNI Order is not "narrowly tailored" to protect customer privacy. The majority refused to apply *Chevron* deference[3] to the agency's construction of Section 222 because, in its view, such deference is inappropriate when the agency interpretation "raises serious constitutional questions." 182 F.3d at 1231 (Pet. App. at 14a) (citing *Williams v. Babbitt,* 115 F.3d 657, 661-62 (9th Cir. 1997)).

Judge Briscoe's dissent argued that where a statute is silent or ambiguous, as Section 222 is on what form of "approval" must be provided for carrier use of CPNI, courts should defer to the agency's interpretation where it is a reasonable construction of the statute. 182 F.3d at 1241-42 (Pet. App. at 36a-37a). She reasoned that U S West's arguments were "aimed at the restrictions and requirements outlined in § 222 rather than the approval method adopted in the CPNI Order." *Id.* at 1243 (Pet. App. at 42a). Judge Briscoe concluded that the CPNI rules do not affect speech because they "simply adopt[] from an extremely limited range of choices the particular method a carrier must use in obtaining customer approval." *Id.* at 1243 (Pet. App. at 43a). Finally, Judge Briscoe criticized the majority's rejection of the FCC's privacy rationale because

> The privacy interest did not originate with the FCC or the CPNI Order; rather, it originated with Congress

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[3] *Chevron U.S.A., Inc. v Natural Resources Defense Council,* 467 U.S. 837 (1984).

> when it enacted the restrictions outlined in § 222. Precisely how the FCC could have or, for that matter, why it would have included in the administrative record "more empirical explanation and justification" for an interest that originated with Congress, and thus predated the administrative process in this case, is unclear. As an administrative agency, and not an independent branch of government, the FCC was obligated to implement without question Congress' directive to require some form of customer approval.

182 F.3d at 1245 (Pet. App. at 46a-47a).

The full court of appeals, by a 6-5 vote, denied CPI's petition for *en banc* rehearing on November 30, 1999 without opinion. (Pet. App. at 90a-92a).

## SUMMARY OF ARGUMENT

The court of appeals' decision is a dangerous departure from settled rules of statutory construction and the proper role of federal courts in assessing the constitutionality of agency rules. An "opt-in" requirement for customer approval for use of CPNI is not the First Amendment equivalent to a direct ban on communication with customers. CPNI is data, not speech, and the FCC's CPNI rules do not restrict or prohibit any communication in which a telephone company may desire to engage with any customer. Unlike the prohibitions on direct customer solicitation that this Court has invalidated, the FCC's CPNI rules, at most, marginally increase the cost of "targeted marketing" by regulating the use of CPNI as a source of mailing lists. The court of appeals' implicit assumption that an "opt-in" rule

makes targeted commercial speech economically impossible is completely unsupported.

Addressing the governmental interest in customer privacy in the context of the FCC's rules is in any event improper, because the nature and sufficiency of that interest are relevant only to the constitutionality of the 1996 Act itself, a matter not challenged in this case. Both an "opt-in" and "opt-out" method would obviously affect some speech. Thus, the court of appeals used judicial review of agency action to collaterally attack the constitutionality of the statute itself, an impermissible exercise of judicial power that threatens the function of administrative agencies in implementing congressionally established public policies. Further, in assessing the applicability of customers' privacy interests, the court of appeals incorrectly applied a "least restrictive means" test to the FCC's regulations, contravening the more liberal standard for limitation of commercial speech under *Central Hudson.*

Finally, the court of appeals has erroneously imposed its own view of the relative merits of the different means of implementing Section 222 by rejecting the agency's reasonable interpretation that customer "approval" requires affirmative, "opt-in" consent. This conflicts with the *Chevron* deference due the agency and contradicts the FCC's rulemaking authority under the 1996 Act recently confirmed by this Court in *AT&T Corp. v. Iowa Utilities Board,* 119 S. Ct. 721 (1999). Individually and collectively, these are compelling reasons why this Court should grant certiorari in order to examine, on the merits, the court of appeals' ruling on the profoundly important privacy questions raised in this case.

## REASONS FOR ISSUING THE WRIT

### I. THE COURT OF APPEALS' JUDGMENT IMPERMISSIBLY EXPANDS FIRST AMENDMENT PRINCIPLES TO OVERRULE RESTRICTIONS ON THE COMMERCIAL USE OF PERSONAL DATA THAT DO NOT DIRECTLY OR INDIRECTLY PROHIBIT SPEECH

The court of appeals' judgment is a highly troubling departure from settled standards of assessing commercial speech restrictions. First, the court treated the CPNI rules as a prohibition on speech, when in fact the FCC's regulations merely implement a statutory bar against commercial use of personal telecommunications data without customer consent. Second, the court improperly rejected congressional findings that such personal data warrants privacy protection and required the government to meet a First Amendment "strict scrutiny" standard inapplicable to commercial speech cases.

#### A. CPNI Is Data, Not Expression, That Is Not Constitutionally Protected

The First Amendment infirmity that the court of appeals purported to find in the FCC's "opt-in" CPNI rules is ephemeral. The limitations on the use of CPNI adopted in the *Second CPNI Order* are not directed at the content of communications with customers and do not prohibit, regulate or restrict any marketing communication by any telecommunications carrier.

Contrary to the court of appeals' analysis, CPNI itself is not speech, but rather data. Consistent with Section 222, the FCC defines CPNI as information about a customer's use of telecommunications "that is made available by the customer

solely by virtue of the customer-carrier relationship." 47 C.F.R. § 64.2003(c). CPNI includes data regarding "to whom, where and when a customer places a call, as well as the types of service offerings to which the customer subscribes and the extent the service is used." *Second CPNI Order*, 13 FCC Rcd. at 8064 (Pet. App. at 57a). Although this information is an ingredient that may be useful to focus marketing communications on a target audience, it is not, by itself, constitutionally protected speech. The issue in this case is only how CPNI can be used as the criteria by which telephone companies select customers and potential customers to receive their marketing communications. Importantly, the court of appeals did *not* hold that the FCC's rules restrict the *publication* of CPNI itself.

CPNI is a source of data that can be used in developing carrier marketing campaigns targeting specific customers. The FCC's regulations merely prevent carriers from using this data to market unrelated services — those services not "necessary to or used in" a customer's existing communications services — without the affirmative consent of the customer. 47 U.S.C. § 222(c)(1) (Pet. App. at 95a). The CPNI rules do not prohibit any customer solicitations, but instead only affect the information that can be used to determine the audience to be solicited. While the data comprising CPNI may express some of the commercial attributes of telecommunications customers, "[i]t is possible to find some kernel of expression in almost every activity a person undertakes . . . [and] such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989).

The FCC's CPNI rules do not restrict, let alone ban, any commercial speech. As Judge Briscoe's dissent below explains, the agency's choice of an "opt-in" rule for obtaining customer consent for use of telephone usage data does not "directly impact a carrier's expressive activity (by, for example, limiting the manner in which the carrier can speak), nor does it indirectly impact a carrier's expressive activity in such a manner as to warrant First Amendment scrutiny." 182 F.3d at 1244 (Pet. App. at 47a-48a). Indeed, respondent U S West conceded that it was really arguing that the practical impact of the CPNI rules is only to prevent speaking to customers "on an individualized basis," which does not prevent speech entirely but may make it less effective for targeted marketing purposes. 182 F.3d at 1243 (Pet. App. at 41a).

The court of appeals' opinion never comes to grips with this important distinction. It is true that indirect burdens on protected speech can be constitutionally significant in some circumstances. The Tenth Circuit's analysis, however, fails to differentiate between a direct speech restriction and the indirect economic effect, as claimed here, of a rule that may increase the cost of "individualized or customized" speech. These indirect economic impacts are not only questionable — there is no support in the record for the proposition that all targeted marketing communication is economically impractical absent use of CPNI — but have been recognized by this Court only where the restriction is an overriding deterrent to all speech. *See, e.g., United States v. NTEU,* 513 U.S. 454, 469 (1995) (ban on honoraria); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board,* 502 U.S. 105 (1991) (ban on compensating criminals in publishing deals).

The court of appeals appears to have assumed, without analysis, that the impact of the CPNI rules is so significant that, for constitutional purposes, they should be treated as a restriction on speech even though the rules allow U S West to engage in any speech it wants, to whatever audience it chooses. While the First Amendment "protects [the speakers'] right not only to advocate their cause but also to select what they believe is the most appropriate means for so doing," *Meyer v. Grant,* 486 U.S. 414, 424 (1988), the CPNI rules do not prohibit carriers from selecting the means of engaging in commercial speech. For instance, nothing precludes U S West and other telephone companies from using other sources of information (mailing lists, consumer market research, etc.) to "target" its marketing speech to a customized audience. Whether or not the purported economic impact of its inability to use CPNI as the basis for marketing campaigns rises to a level sufficient to warrant constitutional scrutiny is at best questionable and, in any event, remains unaddressed in the court of appeals' decision.[4]

Thus, this case substantially differs from the commercial speech decisions relied on by respondent and the court of appeals. Contrary to the court's citation of *Florida Bar v. Went for It, Inc.,* 515 U.S. 618 (1995), this case does not involve any direct ban on "targeted" speech. In *Went For It* and similar cases, the courts were examining rules that prohibited speech itself. For instance, the Florida Bar rule in *Went For It* made direct mail advertisements to accident vic-

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[4] *See, e.g.,*182 F.3d at 1232 (Pet. App. at 13a) ("The existence of alternative channels of communication, such as broadcast speech, does not eliminate the fact that the CPNI regulations restrict speech.").

tims unlawful. *Id.* at 620-21. Similarly, *Martin v. Struthers*, 319 U.S. 141 (1943), *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), *Schneider v. State*, 308 U.S. 147 (1939), and *Edenfield v. Fane,* 507 U.S 761 (1993), all involved outright prohibitions on direct or in-person solicitations. Each of these cases invalidated regulations that prevented solicitation of customers. In contrast, the *Second CPNI Order* does not prevent soliciting customers; it eliminates one method of gathering information to determine which customers to solicit.

The speech constraint U S West complains of is no more than a restriction on telecommunications carriers' ability to presume that a customer consents to using his personal information when the carrier cannot or has not obtained express consent from that customer. The First Amendment does not require that a customer's consent be assumed. Indeed, such a result impermissibly impairs an individual's ability to assert his privacy rights guaranteed under the Constitution. "[W]e have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).[5] When

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[5] Similarly, there is no impermissible abridgement of the right to receive information in the *Second CPNI Order*. The First Amendment "necessarily protects the right to receive" information. *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972). The *Second CPNI Order* allows the customer to receive information by giving his affirmative consent. Such a slight effect on the rights of a listener is clearly constitutional. This Court has recognized the strong government interest in certain forms of economic regulation, even though such regulations may have an incidental effect on rights of speech and association. *National*

*footnote continued on nextpage*

Congress enacted Section 222, it protected customers from just this sort of unwanted speech associated with telecommunications carriers using CPNI for marketing purposes.

> [W]e have been careful to acknowledge that unwilling listeners may be protected when in their own homes. In *Schneider*, for example, in striking down a complete ban on handbilling, we spoke of a right to distribute literature only "to one willing to receive it." Similarly, when we invalidated a ban on door-to-door solicitation in *Martin*, we did so on the basis that the "home owner could protect himself from such intrusion by an appropriate sign 'that he is unwilling to be disturbed.'"

*Frisby*, 487 U.S. at 485 (1988) (internal citations omitted).

Section 222, and the FCC's implementing "opt-in" rule for customer approval, are thus a valid exercise of government authority to protect against unwanted use of private data. The FCC's CPNI restrictions are similar to efforts of homeowners to curtail door-to-door solicitation — empowering customers to prevent unwanted commercial solicitation via targeted marketing. Regulation in this area is thus entirely appropriate, because the government may "prohibit speech when a 'captive' audience cannot avoid" it. *Frisby*, 487 U.S. at 487. As further discussed in the next section, even if the CPNI rules did restrict commercial speech, the FCC's *Second CPNI Order* is completely consistent with this Court's settled commercial speech precedents.

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*Association for the Advancement of Colored People, et. al., v. Claiborne*, 458 U.S. 886, 912 (1982).

### B. The FCC's "Opt-In" Approach Is Plainly a "Reasonable" Means of Protecting Consumer Privacy Interests

Commercial speech doctrine requires the government to have a "substantial interest" in regulating the affected speech and to fashion regulations that "materially advance" that interest. *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). Even if CPNI itself were considered speech for First Amendment purposes, the court of appeals below strayed from proper commercial speech analysis in rejecting the sufficiency of the governmental interest in telecommunications privacy and in requiring the FCC to meet a "least restrictive means" standard inapplicable in commercial speech cases.

First, the court of appeals held that the governmental interest in protecting telephone customer privacy is insufficient to qualify as a "substantial" interest for purposes of First Amendment commercial speech analysis.[6] The flaw in this approach is that the privacy interest in CPNI was established by Congress in enacting Section 222, not by the FCC in deciding how to implement that statute's command for customer "approval." Whether an "opt-in" or "opt-out" approach is permissible under the 1996 Act is a question completely unrelated to whether customer privacy is a constitutionally sufficient governmental interest under the *Central Hudson* First Amendment test. More importantly, it

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[6] "Neither Congress nor the FCC explicitly stated what 'privacy' harm § 222 seeks to protect against." 182 F.3d. at 1235 (Pet App. at 21a). Further, the court expressed "doubts about whether this interest, as presented, rises to the level of 'substantial'" under *Central Hudson*. *Id.*

is settled that "[p]rotection of potential clients' privacy is a substantial state interest." *Edenfield v. Fane,* 507 U.S. at 769. Thus, the *Second CPNI Order* regulates only matter in which the government clearly has a substantial interest.

Second, the question of "opt-in" versus "opt-out" as a means of implementing Section 222 is not a matter of constitutional significance. Both place requirements on carriers that must be met before CPNI is used or disclosed. Both increase the cost of engaging in the "targeted speech" of which respondent complains here. And as discussed in Section II below, both would be permissible interpretations of the "approval" proviso in the statute.

Third, and most significantly, in deciding whether the FCC's *Second CPNI Order* "materially advances" the governmental interest in customer privacy, the court of appeals erroneously required the FCC to demonstrate that its CPNI rules were the least restrictive alternative for regulating CPNI. The Tenth Circuit held that the FCC had "fail[ed] to adequately consider an obvious and substantially less restrictive alternative," the "opt-in" method. 182 F.3d at 1238 (Pet App. at 30a). But the FCC in fact expressly evaluated the relative merits of the opt-out alternative.[7]

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[7] The FCC concluded that "imposing an express approval requirement provides superior protection for privacy interests because, unlike under the opt-out approach, when customers must affirmatively act before their CPNI is used or disclosed, the confidentiality of CPNI is preserved until the customer is actually informed of its statutory protections." *Second CPNI Order*, 13 FCC Rcd. at 8133 (Pet App. at 87a).

Further, it is settled that the "'least restrictive means' test has no role in the commercial speech context." *Florida Bar v. Went for It*, 515 U.S. 618, 632 (1995). As this Court explained in *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989), in commercial speech cases the fit between the restrictions and the governmental interest does not need to be "perfect, but reasonable." A commercial speech regulation "can, in fact, be more extensive than is necessary to serve the government's interest as long as it is not unreasonably so. This intermediate level of scrutiny is a far cry from strict scrutiny, under which the government interest must be 'compelling' and the regulation 'narrowly tailored' to serve that interest." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 434 (1993) (Blackmun, J., concurring).

There is no legitimate question that the FCC's opt-in scheme for implementing Section 222 is a "reasonable" means of effectuating the clearly substantial governmental interest in protecting the privacy of customer telecommunications usage information. Instead, by attacking the privacy basis for CPNI protections and applying strict scrutiny to the FCC's implementation of that congressionally mandated policy, the court of appeals below has "stray[ed] from the narrow scope of the *CPNI Order* and effectively take[n] into account the statutory restrictions on CPNI usage." 182 F.3d at 1244 (Briscoe, J., dissenting) (Pet. App. at 44a). Therefore, the court of appeals' decision to vacate the *Second CPNI Order* must be reversed.

## II. THE COURT OF APPEALS' DECISION CONTRAVENES SEPARATION OF POWERS BY SUBSTITUTING JUDICIAL POLICY JUDGMENTS FOR AGENCY RESPONSIBILITY IN STATUTORY INTERPRETATION

Well-settled principles of administrative law dictate that when Congress enacts legislation and a federal agency promulgates rules pursuant to that legislation, federal courts are to presume the validity of the agency's judgment. *Chevron U.S.A, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). This presumption carries the day unless the agency has acted contrary to the expressed will of Congress or has violated rights secured by the Constitution. *Rust v. Sullivan*, 500 U.S. 173, 190 (1991); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

In this case, the court of appeals refused to exercise the requisite *Chevron* deference, relying instead on its own uninformed policy determinations and constitutional concerns to vacate the agency's rules. This arrogation of power cannot be squared with well-established administrative law, Article III limitations on the role of the judiciary vis-a-vis the executive, or this Court's recogniton of the FCC's plenary rulemaking powers under the 1996 Act.

### A. The FCC's *Second CPNI Order* Raises No Grave Constitutional Issues Warranting Departure from Chevron Deference to Administrative Interpretation

This Court's landmark *Chevron* decision provides a clear standard for reviewing agency interpretations of ambiguous statutes:

> [I]f the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842-43.

A federal agency's entitlement to judicial deference on review may be limited only when "grave and doubtful constitutional questions" are raised by agency action. *United States ex rel. Hudson v. Delaware & Hudson Co.*, 213 U.S. 366, 408. *Accord*, *Rust v. Sullivan*, 500 U.S. at 191; *DeBartolo*, 485 U.S. at 575; *Williams v. Babbitt*, 115 F.3d 657, 662 (9th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 1795 (1998). Thus, not any merely colorable claim as to the constitutionality of a regulation will strip an agency of *Chevron* deference. Rather, courts "limit this intrusion on agency power to situations where it's absolutely necessary." *Babbitt*, 115 F.3d at 662.

Where an act of Congress necessarily touches constitutional concerns, reasoned agency judgment weighing equally rational policy alternatives must not be displaced.[8] For example, in *Rust*, this Court evaluated Department of Health and Human Services regulations prohibiting federally funded

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[8] "If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it." *United States v. Shimer*, 367 U.S. 374, 383 (1961).

entities from advocating abortion as a method of family planning. The Court, bound by its earlier decision in *Roe v. Wade*, 410 U.S. 113 (1973), recognized that "any set of regulations promulgated by the Secretary [of the Department] . . . would be challenged on constitutional grounds." 500 U.S. at 191. According deference to the Secretary's policy determination, however, the Court found that his action did not, as against other possible actions, "raise the sort of 'grave and doubtful constitutional questions' that would lead us to assume Congress did not intend to authorize their issuance." *Id.*

Thus, agencies are not precluded from exercising their regulatory discretion when an act of Congress, although raising possible constitutional issues, requires agencies to interpret and enforce its provisions. Here, however, the court of appeals failed to apply this principle of judicial restraint, holding that the mere existence of a constitutional question was sufficient to justify a *de novo* standard of judicial review and accord no deference to the findings or reasoning of the agency. 182 F.3d at 1231 (Pet. App. at 11a). This misapplication of constitutional sensitivity resulted in the court's vacating the *Second CPNI Order* on the basis of its own policy judgment, thereby encroaching upon the power of the executive branch to adopt regulatory policy within its statutory authority.

The *Second CPNI Order* does not raise "grave and doubtful constitutional questions" that support *de novo* review of the FCC's decision. Assuming CPNI is "speech," the lack of a definition in Section 222 compelled the FCC to decide whether "approval of the customer" requires affirmative, "opt-in" consent or passive, "opt-out" rejection. There is no question that, under *Chevron,* the FCC's

interpretation would be entitled to judicial deference in the absence of a constitutional challenge, because without any statutory definition of "approval," the legislation is manifestly ambiguous. Having before it a statutory requirement for customer approval for use or disclosure of CPNI, the FCC was required to fashion some mechanism to implement the "approval" standard in practice.

Even if the court of appeals' First Amendment concerns were relevant to the FCC's rules (as opposed to the underlying statute), they are makeweight, for the reasons explained in detail above. Consequently, by construing *DeBartolo* to override *Chevron* whenever a possible constitutional issue lurks in judicial review of agency rulemakings, the court of appeals assumed the role of policy maker. The court of appeals reasoned that the "the FCC still insufficiently justified its choice to adopt an opt-in regime," 182 F.3d at 1240 (Pet. App. at 33a), solely because the court believed that the opt-out alternative was preferable in terms of protecting carriers' commercial speech interests. But neither the statute, nor the FCC's rules, present "grave and doubtful constitutional questions" under this Court's commercial speech jurisprudence. Without the necessary constitutional predicate, the court of appeals' judgment is simply the court's imposition of its own view on proper public policy in lieu of those of the expert agency charged by Congress with regulating telecommunications. Long-standing precedent prohibits this kind of judicial encroachment upon the discretion of administrative agencies. *Chevron*, 467 U.S. at 844; *United States v. Shimer*, 367 U.S. 372, 382 (1961).

As this Court has recognized, Congress has intentionally relied upon this administrative expertise, endowing the FCC with plenary jurisdiction to regulate telecommunications un-

der the Communications Act of 1934[9] and again in the 1996 Act. In *Iowa Utilities Board,* the Court reiterated that the FCC has broad authority to implement the Act's terms and make congressional policy a reality. *Iowa Utils. Bd.*, 119 S. Ct. at 730 ("the grant in § 201 [of the Act] means what it says: The FCC has rulemaking authority to carry out 'the provisions of this Act.'"). Given this broad agency jurisdiction over today's complex telecommunications industry, and the absence of any "grave" constitutional issue, the court of appeals' rejection of *Chevron* deference is a very unsettling departure from appropriate bounds of limited judicial review that warrants this Court's consideration on the merits.

### B. Federal Courts May Not Apply Concerns of Constitutionality to Quite Different Concerns Regarding Agency Implementation

The court of appeals' reasoning calls into question the judgment of Congress, not the FCC. U S West sought review of the FCC's *Second CPNI Order* pursuant to Section 402(a) of the Communications Act, 47 U.S.C. § 402(a), on grounds that the FCC's rules violated the First and Fifth Amendments to the Constitution. 182 F.3d at 1231 (Pet. App. at 8a). Nowhere in the proceedings below was the validity of the underlying provisions of Section 222 addressed or questioned, as the majority acknowledges. *Id.* Nonetheless, the gravamen of the majority's conclusion rests

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[9] *E.g., Capital Cities Cable v. Crisp*, 467 U.S. 691, 699-700 (1984) ("the Court [has] found that that Commission had been given 'broad responsibilities' to regulate all aspects of interstate communication by wire or radio by virtue of section 2(a) of the Communications Act of 1934").

squarely on an attack on the congressional statute and the policy underpinnings of its language.[10]

Addressing only the First Amendment issue, the court of appeals conducted its analysis under *Central Hudson* with a heavy-handed suspicion of the validity of Congress's motivation in enacting Section 222. First, the court second-guessed the privacy interest at stake in Section 222, noting dubiously that "the breadth of the concept of privacy requires us to pay particular attention to attempts by the government to assert privacy as a substantial state interest." 182 F.3d at 1234 (Pet. App. at 18a). The court then found that "[n]either Congress nor the FCC explicitly stated what 'privacy' harm § 222 seeks to protect against." 182 F.3d at 1235 (Pet. App. at 21a). As Judge Briscoe correctly observed in dissent, this statement reveals the majority's clear animus toward Section 222 itself, and not the FCC's subsequent rules. 182 F.3d at 1244 (Pet. App. at 44a).

In collaterally attacking the constitutionality of Section 222, the court of appeals purported to follow the old canon first articulated in *Hooper v. California*, 155 U.S. 648, 657 (1895), that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." 182 F.3d at 1231 (Pet. App. at 9a-10a). Indeed, federal courts are required to avoid deciding cases on constitutional grounds where a statutory holding is sufficient to dispose of the

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[10] As Judge Briscoe aptly noted in dissent, "[i]t is difficult to tell from the majority's opinion where its analysis of the CPNI Order ends and its analysis of the statute begins. For much of the opinion, the majority appears to be reviewing the constitutionality of § 222 rather than the CPNI Order." 182 F.3d at 1244 n.6 (Pet. App. at 44a).

matter. *Rust*, 500 U.S. at 191 (citation omitted). In reaching out to decide the First Amendment question based on an invalid rejection of administrative agency discretion in resolving statutory ambiguities, the court of appeals has established a new and risky role for courts, one that can easily lead to the inadvertent creation of judge-made rights in the context of judicial review of administrative action. As Judge Posner has written,

> [t]he practical effect of interpreting statutes to avoid raising constitutional questions is therefore to enlarge the already vast reach of constitutional prohibition beyond even the most extravagant modern interpretation of the Constitution — to create a judge-made constitutional 'penumbra' that has much the same prohibitory effect as the judge-made (or at least amplified) Constitution itself. And we do not need that.[11]

The court of appeals' conclusion that it was required to pay "particular attention" to the validity of the privacy considerations underlying Section 222 and the FCC's CPNI rules is misplaced. Congress's intent to protect consumer privacy in the midst of the exploding information age is unmistakable. Not only does Section 222 impose privacy obligations on telecommunications carriers, but Section 631, 47 U.S.C. § 551, requires cable operators to inform all subscribers upon commencing service that the operator will collect "personally identifiable information" about the subscriber and to explain the parameters for "the nature,

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[11] Richard A. Posner, *Statutory Interpretation – In The Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 816 (1983).

frequency, and purpose of any disclosure" of the information. 47 U.S.C. § 551(a)(1) (Pet. App. at 99a). Congress's interest in privacy thus pervades communications and is evident a variety of existing and proposed legislation.[12]

Moreover, this Court's decisions require federal courts to defer to congressional legislative judgments even if a particular statute raises potential constitutional concerns. In *Turner Broadcasting v. FCC*, 520 U.S. 180 (1997), the Court reviewed Congress's "must-carry" provisions included in the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 534-535, under the First Amendment. Despite the clear effect of those provisions — federally compelled speech imposed on cable providers — the Court gave deference to Congress, both in its factual findings and policy judgment in support of must-carry rules. 520 U.S. at 195-96. The Court found that "[e]ven in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when en-

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[12] See, e.g., Child Online Privacy Protection Act, 15 U.S.C. 6501 (1998). Congress's continued interest in protecting consumer privacy is evidenced in several pending legislative initiatives: H.R. 313, 106th Cong. 1st Sess. (1999); H.R. 367, 106th Cong. 1st Sess. (1999); H.R. 514, 106th Cong. 1st Sess. (1999); H.R. 1057, 106th Cong. 1st Sess. (1999); H.R. 1910, 106th Cong. 1st Sess. (1999); S. 759, 106th Cong. 1st Sess. (1999); S. 573, 106th Cong. 1st Sess. (1999); S. 854, 106th Cong. 1st Sess. (1999).

acting nationwide regulatory policy." 520 U.S at 196.[13] Thus, the court of appeals plainly encroached upon Congress's power rejecting, for its own reasons, the "'privacy' harm § 222 seeks to protect against." 182 F.3d at 1234 (Pet. App. at 21a).

In sum, the court of appeals seriously erred by confusing its constitutional reservations about Section 222 with the validity of the FCC's *Second CPNI Order*. When presented with constitutional infirmities in a statute, federal courts must address those issues directly and should not clothe qualms about a statute's constitutionality in the garb of Administrative Procedure Act review. Federal courts are bound to presume that Congress acted within the bounds of the Constitution and must not "lightly assume that Congress intended to infringe constitutionally protected liberties or usurp the power constitutionally forbidden it." *DeBartolo*, 485 U.S. at 575. The court of appeals here has demonstrated a marked and improper indifference to Congress's express policy judgments, running roughshod over powers of the legislature.

The court of appeals' decision below is thus either a disregard of Congress's expressed intent or the *sub silentio* judicial repeal of a federal statute. Even if they were based on valid public policy, either of these explanations raises grave separation of powers implications, for each represents improper judicial intrusion into the law-making province of Congress.

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[13] *See also Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 365 (1985) (courts must defer to Congress's judgment when Fifth Amendment due process concerns arise out of a statute).

## CONCLUSION

For all these reasons, the writ of certiorari should be granted.

Respectfully submitted,

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February 28, 2000

No. 99-___

IN THE

# Supreme Court of the United States

COMPETITION POLICY INSTITUTE,

*Petitioner,*

v.

U S WEST, INC.,

*Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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U.S. WEST, INC., Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, and United States of America, Respondents, Airtouch Communications, Inc. (Airtouch); Sprint Corporation; AT & T Corporation; SBC Communications, Inc. (Sbc); Southwestern Bell Telephone Company; Pacific Bell; Nevada Bell; MCI Telecommunications Corporation; Competitive Telecommunications Association; Competition Policy Institute; Bellsouth Corporation; Frontier Corporation, Intervenors,

and

Information Industry Association, Amicus Curiae.

No. 98-9518.
United States Court of Appeals,
Tenth Circuit.
Aug. 18, 1999.

Before TACHA, EBEL, and BRISCOE, Circuit Judges.

TACHA, Circuit Judge.

Pursuant to 28 U.S.C. s 2342(1) and 47 U.S.C. s 402(a), U.S. West, Inc. petitions for review of a Federal Communication Commission ("FCC") order restricting the use and disclosure of and access to customer proprietary network information ("CPNI"). See Second Report and Order and Further Notice of Proposed Rulemaking: In the Matter of Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Consumer

Proprietary Network Information and Other Customer Information; Implementation of Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, 63 Fed.Reg. 20,326 (1998) ("CPNI Order"). Petitioner argues that the regulations adopted by the CPNI Order constitute an arbitrary and capricious interpretation of the controlling provisions of 47 U.S.C. s 222 and are impermissible because they violate the First and Fifth Amendments of the United States Constitution. The regulations require telecommunications companies, in most instances, to obtain affirmative approval from a customer before the company can use that customer's CPNI for marketing purposes. We vacate the FCC's CPNI Order, concluding that the FCC failed to adequately consider the constitutional ramifications of the regulations interpreting s 222 and that the regulations violate the First Amendment.

## I. Introduction

This case involves classic issues of separation of powers and the courts' necessary role as guardians of constitutional interests. It is seductive for us to view this as just another case of reviewing agency action. However, this case is a harbinger of difficulties encountered in this age of exploding information, when rights bestowed by the United States Constitution must be guarded as vigilantly as in the days of handbills on public sidewalks. In the name of deference to agency action, important civil liberties, such as the First Amendment's protection of speech, could easily be overlooked. Policing the boundaries among constitutional guarantees, legislative mandates, and

administrative interpretation is at the heart of our responsibility. This case highlights the importance of that role.

## II. Background

The dispute in this case involves regulations the FCC promulgated to implement provisions of 47 U.S.C. s 222, which was enacted as part of the Telecommunications Act of 1996. Section 222, entitled "Privacy of customer information," states generally that "[e]very telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to ... customers." 47 U.S.C. s 222(a). To effectuate that duty, s 222 places restrictions on the use, disclosure of, and access to certain customer information. At issue here are the FCC's regulations clarifying the privacy requirements for CPNI. [FN1] The *1229 central provision of s 222 dealing with CPNI is s 222(c)(1), which states:

FN1. The statute recognizes three types of customer information: (1) CPNI; (2) aggregate customer information; and (3) subscriber list information. The statute defines CPNI as: (A) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and (B) information contained in the bills pertaining to telephone exchange service or telephone tool service received by a customer of a

> carrier; except that such term does not include subscriber list information. 47 U.S.C. s 222(f)(1)(A)-(B). Given the sensitive nature of some CPNI, such as when, where, and to whom a customer places calls, Congress afforded CPNI the highest level of privacy protection under s 222. By way of comparison, aggregate customer information is "collective data that relates to a group or category of services or customers, from which individual customer identities and characteristics have been removed," id. s 222(f)(2), and subscriber list information consists of the type of information normally published in telephone directories, such as names, numbers, addresses and primary advertising classifications, see id. s 222(f)(3). Congress afforded these other types of customer information substantially less privacy protection under s 222. See id. ss 222(c)(3), (e).

Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunication service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.

Section 222(d) provides three additional exceptions to the CPNI privacy requirements. Those exceptions allow

a telecommunications carrier to use, disclose or permit access to CPNI:

(1) to initiate, render, bill, and collect for telecommunications services,

(2) to protect the rights or property of the carrier, or to protect users of those services and other carriers from fraudulent, abusive, or unlawful use of, or subscription to, such services, or

(3) to provide any inbound telemarketing, referral, or administrative services to the customer for the duration of the call, if such call was initiated by the customer and the customer approves of the use of such information to provide such service.

47 U.S.C. s 222(d).

Therefore, the essence of the statutory scheme requires a telecommunications carrier to obtain customer approval when it wishes to use, disclose, or permit access to CPNI in a manner not specifically allowed under s 222.

Section 222 is not the first time the government has placed restrictions on telecommunications carriers' use or disclosure of CPNI. Prior to the enactment of s 222, the FCC had imposed CPNI requirements on the enhanced service operations of several major telecommunications carriers. See CPNI Order p 7. The FCC imposed these CPNI requirements primarily to prevent large carriers from gaining a competitive advantage in the unregulated enhanced services markets through the use of CPNI, thereby protecting smaller carriers. See id. In contrast, Congress made s 222, which is much broader in scope than previous CPNI requirements, applicable to all carriers, not just the

dominant ones. This suggests that Congress enacted s 222 for a substantially different purpose than previous FCC CPNI requirements.

Faced with the new CPNI restrictions, various telecommunications companies and trade associations sought FCC guidance regarding their obligations under s 222. See id. p 6 & n. 25. These requests, along with a petition for a declaratory ruling regarding the interpretation of the term "telecommunication service" under s 222(c)(1), prompted the FCC to commence a rulemaking on May 17, 1996. See id. p 6; In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunication Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Notice of Proposed Rulemaking, 61 Fed.Reg. 26,483 (1996) ("CPNI NPRM"). The CPNI NPRM sought comment on, among other things: "(1) the scope of the phrase 'telecommunications service,' as it is used in section 222(c)(1) ...; (2) the requirements *1230 for customer approval; and (3) whether the Commission's existing CPNI requirements should be amended in light of section 222." CPNI Order p 6 (citing CPNI NPRM pp 20-33, 38-42). On February 26, 1998, the FCC released the CPNI Order we now review. The CPNI Order addresses the meaning and scope of s 222 and adopts regulations to implement the statute's CPNI requirements. See 47 C.F.R. pt. 64, subpt. U (1998). The regulations adopted by the CPNI Order interpret s 222(c)(1) through a framework known as the "total service approach." That approach divides the term "telecommunications service" into three service categories: (1) local; (2) interexchange (which includes most long-distance toll service); and (3)

commercial mobile radio service ("CMRS") (which includes mobile or cellular service). See 47 C.F.R. s 64.2005(a). Broadly stated, the regulations permit a telecommunications carrier to use, disclose, or share CPNI for the purpose of marketing products within a category of service to customers, provided the customer already subscribes to that category of service. See id. However, the carrier may not, without customer approval, use, disclose, or permit access to CPNI for the purpose of marketing categories of service to which the customer does not already subscribe. See id. s 64.2005(b). [FN2] For example, petitioner could use CPNI obtained through the provision of local service to market other local service products, but not cellular services. Moreover, if the customer subscribes to both local and long-distance services, petitioner could use the CPNI to market either service and could exchange the CPNI between affiliates that provide such services, but petitioner could still not use the CPNI to market cellular services. In addition, the regulations prevent telecommunications carriers from using, without customer approval, CPNI gained from any of the three categories described above to: (1) market customer premises equipment ("CPE") or information services (such as call answering, voice mail, or Internet access services); (2) identify or track customers that call competitors; and (3) regain the business of customers who have switched to another carrier. See id. s 64.2005(b)(1)-(3). The regulations also set forth some additional narrow exceptions to the CPNI requirements, other than those stated in s 222(d). See id. s 64.2005(c).

FN2. The regulations treat affiliated entities of a carrier as separate for the purposes of use or

disclosure. Thus, the regulations permit unapproved disclosure of CPNI between affiliated entities of a telecommunications carrier only when the carrier provides different categories of service and the customer subscribes to more than one category of service. See id. ss 64.2005(a)(1)-(2).

The regulations also describe the means by which a carrier must obtain customer approval. Section 222(c)(1) did not elaborate as to what form that approval should take. The FCC decided to require an "opt-in" approach, in which a carrier must obtain prior express approval from a customer through written, oral, or electronic means before using the customer's CPNI. See 47 C.F.R. s 64.2007(b). The government acknowledged that the means of approval could have taken numerous other forms, including an "opt-out" approach, in which approval would be inferred from the customer-carrier relationship unless the customer specifically requested that his or her CPNI be restricted.

Petitioner challenges the FCC's chosen approval process, claiming it violates the First Amendment by restricting its ability to engage in commercial speech with customers. In addition, petitioner argues that the CPNI regulations raise serious Fifth Amendment Takings Clause concerns because CPNI represents valuable property that belongs to the carriers and the regulations greatly diminish its value. The respondents assert that the FCC's CPNI regulations raise no constitutional concerns, are reasonable, and are entitled to deference under the Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

*1231 III. Discussion

A. Standard of Review

Under the Administrative Procedure Act, we review a final FCC order to determine whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. s 706(2)(A), or "contrary to constitutional right, power, privilege, or immunity," id. s 706(2)(B). See Long v. Board of Governors of the Fed. Reserve Sys., 117 F.3d 1145, 1151 (10th Cir.1997); City of Albuquerque v. Browner, 97 F.3d 415, 424 (10th Cir.1996). In addition, when the question before us involves an agency's interpretation of a statute it administers, we utilize the two-step approach announced in Chevron. See, e.g., Sierra Club v. EPA, 99 F.3d 1551, 1555 (10th Cir.1996). When Congress has spoken to the precise question at issue, we must give effect to the express intent of Congress. See Chevron, 467 U.S. at 842-43, 104 S.Ct. 2778. However, if the statute is silent or ambiguous, we defer to the agency's interpretation, if it is reasonable. See id. at 843-44, 104 S.Ct. 2778. The agency's interpretation of the statute need not be the only reasonable or most reasonable interpretation, see id. at 843 n. 11, 104 S.Ct. 2778, but an unconstitutional interpretation is not entitled to Chevron deference.

In addition, deference to an agency interpretation is inappropriate not only when it is conclusively unconstitutional, but also when it raises serious constitutional questions. See Rust v. Sullivan, 500 U.S. 173, 190- 91, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991);

Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575-76, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988); Williams v. Babbitt, 115 F.3d 657, 661- 62 (9th Cir.1997), cert. denied sub nom. Kawerak Reindeer Herders Ass'n v. Williams, --- U.S. ----, 118 S.Ct. 1795, 140 L.Ed.2d 936 (1998); Chamber of Commerce of the United States v. FEC, 69 F.3d 600, 605 (D.C.Cir.1995); Kohler Co. v. Moen Inc., 12 F.3d 632, 634 n. 2 (7th Cir.1993). When faced with a statutory interpretation that "would raise serious constitutional problems, the [c]ourt[s] will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." DeBartolo Corp., 485 U.S. at 575, 108 S.Ct. 1392. We follow this approach because we assume that Congress legislates with constitutional limitations in mind and will speak clearly when it seeks to test those limitations. See Rust, 500 U.S. at 191, 111 S.Ct. 1759; DeBartolo Corp., 485 U.S. at 575, 108 S.Ct. 1392; Williams, 115 F.3d at 662; International Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. OSHA, 938 F.2d 1310, 1317 (D.C.Cir.1991) ("In effect we require a clear statement by Congress that it intended to test the constitutional waters."). The Williams court aptly explained the doctrine as it applies to agencies: [J]ust as we will not infer from an ambiguous statute that Congress meant to encroach on constitutional boundaries, we will not presume from ambiguous language that Congress intended to authorize an agency to do so. At the core of DeBartolo lies the presumption that, if Congress means to push the constitutional envelope, it must do so explicitly. Williams, 115 F.3d at 662.

Petitioner raises First and Fifth Amendment challenges to the approval procedure adopted by the FCC. The parties agree that Congress did not explicitly set forth the form of customer approval carriers must obtain. Therefore, if we determine that the FCC's customer approval rule presents a serious or grave constitutional question, we will owe the FCC no deference, even if its CPNI regulations are otherwise reasonable, and will apply the rule of constitutional doubt.

B. Do the CPNI regulations violate the First Amendment?

Petitioner argues that the CPNI regulations interpreting 47 U.S.C. s 222 violate the First Amendment. The First Amendment states, "Congress shall make *1232 no law ... abridging the freedom of speech." U.S. Const. amend. I. Although the text of the First Amendment refers to legislative enactments by Congress, it is actually much broader in scope and encompasses, among other things, regulations promulgated by administrative agencies. See, e.g., Rust, 500 U.S. at 192, 111 S.Ct. 1759 (subjecting Department of Health and Human Services regulations limiting the ability of Title X fund recipients to engage in abortion-related activities to review under the First Amendment).

1. Do the CPNI regulations restrict speech?

As a threshold requirement for the application of the First Amendment, the government action must abridge or restrict protected speech. The government argues that the FCC's CPNI regulations do not violate or even infringe

upon petitioner's First Amendment rights because they only prohibit it from using CPNI to target customers and do not prevent petitioner from communicating with its customers or limit anything that it might say to them. This view is fundamentally flawed. Effective speech has two components: a speaker and an audience. A restriction on either of these components is a restriction on speech. Cf. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-57, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (noting that the First Amendment protects the communication, whether the speech restriction applies to its source or impinges upon the audience's reciprocal right to receive the communication); Martin v. City of Struthers, 319 U.S. 141, 143, 63 S.Ct. 862, 87 L.Ed. 1313 (1943) (noting the First Amendment "embraces the right to distribute literature and necessarily protects the right to receive it"). In other words, a restriction on speech tailored to a particular audience, "targeted speech," cannot be cured simply by the fact that a speaker can speak to a larger indiscriminate audience, "broadcast speech."

Perhaps the Supreme Court case of Florida Bar v. Went For It, Inc., 515 U.S. 618, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995), best illustrates this. In Went For It, a lawyer referral service and an individual lawyer challenged a Florida Bar rule that prohibited attorneys from using direct mail advertisements to solicit wrongful death and personal injury clients within thirty days of the accident or disaster causing death or injury. See 515 U.S. at 620-21, 115 S.Ct. 2371. Despite the fact that the attorney could indiscriminately mail solicitations for his services, the court

found that the targeted speech constituted commercial speech and that the restriction on the targeted speech implicated the First Amendment. See id. at 623, 115 S.Ct. 2371 [FN3]; see also Ficker v. Curran, 119 F.3d 1150, 1153-56 (4th Cir.1997) (applying First Amendment analysis to direct mail solicitations by attorneys to criminal and traffic defendants); Revo v. Disciplinary Bd. of the Sup.Ct. for the State of N.M., 106 F.3d 929, 932-33 (10th Cir.) (determining that lawyer's direct mail advertising to personal injury victims and family members of wrongful death victims constituted protected commercial speech), cert. denied, 521 U.S. 1121, 117 S.Ct. 2515, 138 L.Ed.2d 1017 (1997). Therefore, the existence of alternative channels of communication, such as broadcast speech, does not eliminate the fact that the CPNI regulations restrict speech.

FN3. The court did, however, consider this fact in determining whether the speech restriction was narrowly tailored. See id. at 633-34.

2. What kind of speech is restricted?

Because petitioner's targeted speech to its customers is for the purpose of soliciting those customers to purchase more or different telecommunications services, it "does no more than propose a commercial transaction," Virginia State Bd. of Pharmacy, 425 U.S. at 760, 96 S.Ct. 1817 (quoting Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 385, *1233 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973)). Consequently, the targeted speech in this case fits soundly within the definition of commercial speech. See id.;

Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983); Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 970 (10th Cir.1996); see also e.g., Bad Frog Brewery, Inc. v. New York State Liquor Auth., 134 F.3d 87, 97 (2d Cir.1998) ("The 'core notion' of commercial speech includes speech which does no more than propose a commercial transaction." (internal quotation marks and citation omitted)). It is well established that nonmisleading commercial speech regarding a lawful activity is a form of protected speech under the First Amendment, although it is generally afforded less protection than noncommercial speech. See, e.g., Went For It, 515 U.S. at 623, 115 S.Ct. 2371; Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 562-63, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). The parties do not dispute that the commercial speech based on CPNI is truthful and nonmisleading. Therefore, the CPNI regulations implicate the First Amendment by restricting protected commercial speech. [FN4]

FN4. Petitioner argues that because the CPNI regulations also burden its internal business communications (e.g., communications between its affiliates, divisions, and employees), we should subject the regulations to the more stringent level of First Amendment scrutiny applied to restrictions on noncommercial speech. Without deciding whether the incidental burden on internal business communications necessarily implicates the First Amendment or whether petitioner has standing to assert such an argument, we find that, in this case,

(FN4) the intra-carrier speech is properly categorized as commercial speech and consequently its existence does not impact our analysis.

Petitioner asserts that the intra-carrier speech does not directly propose a commercial transaction to customers and therefore falls outside the definition of commercial speech. We disagree. Although speech that merely proposes a commercial transaction is at the "core" of commercial speech, it does not constitute the universe of commercial speech. Indeed, the Supreme Court has defined commercial speech in broader terms as "expression related solely to the economic interests of the speaker and its audience." Central Hudson, 447 U.S. at 561, 100 S.Ct. 2343. It is, admittedly, unclear to what extent Central Hudson broadened the definition of commercial speech. As another circuit recently stated, "the Court has not offered any nuanced distinctions between the two standards [ i.e., the Virginia Pharmacy and Central Hudson definitions], and the Court noted in Discovery Network that it had not utilized the broader test in its recent commercial speech cases." Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n, 149 F.3d 679, 685 (7th Cir.1998) (citing City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 422, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993)). Consequently, we are hesitant to broadly expand the definition of commercial speech. However, in this case, when the sole purpose of the intra-carrier

(FN4) speech based on CPNI is to facilitate the marketing of telecommunications services to individual customers, we find the speech integral to and inseparable from the ultimate commercial solicitation. Therefore, the speech is properly categorized as commercial speech.

3. Central Hudson analysis

We analyze whether a government restriction on commercial speech violates the First Amendment under the four-part framework set forth in Central Hudson. First, we must conduct a threshold inquiry regarding whether the commercial speech concerns lawful activity and is not misleading. See Central Hudson, 447 U.S. at 566, 100 S.Ct. 2343. If these requirements are not met, the government may freely regulate the speech. See Went For It, 515 U.S. at 623-24, 115 S.Ct. 2371; Revo, 106 F.3d at 932. If this threshold requirement is met, the government may restrict the speech only if it provess: "(1) it has a substantial state interest in regulating the speech, (2) the regulation directly and materially advances that interest, and (3) the regulation is no more extensive than necessary to serve the interest." Revo, 106 F.3d at 932 (citing Central Hudson, 447 U.S. at 564-65, 100 S.Ct. 2343). [FN5] *1234 As noted above, no one disputes that the commercial speech based on CPNI is truthful and nonmisleading. We therefore proceed directly to whether the government has satisfied its burden under the remaining three prongs of the Central Hudson test.

FN5. In 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996), the Supreme Court established a slight modification to the Central Hudson framework by giving force to a footnote contained in Central Hudson. Justice Stevens, writing for a four Justice plurality, stated that when a regulation constitutes a blanket prohibition against truthful, nonmisleading speech about a lawful product and the ban serves an interest unrelated to consumer protection, it will be subject to a heightened form of First Amendment scrutiny akin to strict scrutiny. See id. at 504 (opinion of Stevens, J.) (citing Central Hudson, 447 U.S. at 566 n. 9, 100 S.Ct. 2343). Under such circumstances, we must review the regulation under Central Hudson with "special care, mindful that speech prohibitions of this type rarely survive constitutional review." Id. (opinion of Stevens, J.) (internal quotation marks and citation omitted). Although only four Justices subscribed to this view, given Justice Thomas' concurrence in which he stated that he would abandon Central Hudson altogether and apply traditional strict scrutiny under similar circumstances, see id. at 518, 116 S.Ct. 1495 (Thomas, J., concurring), it is the narrowest majority holding, and we are bound by it. In this case, however, the regulation at issue does not constitute a blanket prohibition of speech. Indeed, the telecommunications carriers may utilize a multitude of communication channels to say whatever they want to their customers. They

simply cannot use CPNI to target customers for marketing efforts. Thus, the CPNI regulations are not subject to heightened scrutiny under 44 Liquormart.

a. Does the government have a substantial state interest in regulating speech involving CPNI?

The respondents argue that the FCC's CPNI regulations advance two substantial state interests: protecting customer privacy and promoting competition. While, in the abstract, these may constitute legitimate and substantial interests, we have concerns about the proffered justifications in the context of this case. Privacy considerations of some sort clearly drove the enactment of s 222. The concept of privacy, though, is multi-faceted. Indeed, one can apply the moniker of a privacy interest to several understandings of privacy, such as the right to have sufficient moral freedom to exercise full individual autonomy, the right of an individual to define who he or she is by controlling access to information about him or herself, and the right of an individual to solitude, secrecy, and anonymity. [FN6] See Fred H. Cate, Privacy in the Information Age 19-22 (1997); Joseph I. Rosenbaum, Privacy on the Internet: Whose Information Is It Anyway?, 38 Jurimetrics J. 565, 566-67 (1998). The breadth of the concept of privacy requires us to pay particular attention to attempts by the government to assert privacy as a substantial state interest.

FN6. We emphasize that the privacy interest in this case is distinct and different from the more limited

notion of a constitutional right to privacy which is addressed in cases such as Griswold v. Connecticut, 381 U.S. 479, 484-86, 85 S.Ct.1678, 14 L.Ed.2d 510 (1965), and Roe v. Wade, 410 U.S. 113, 152-56, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (stating that the constitutional right to privacy covers only personal rights deemed "fundamental" or "implicit in the concept of ordered liberty" (internal quotation marks and citations omitted)). Here, the question is solely whether privacy can constitute a substantial state interest under Central Hudson, not whether the FCC regulations impinge upon an individual's right to privacy under the Constitution.

When faced with a constitutional challenge, the government bears the responsibility of building a record adequate to clearly articulate and justify the state interest. "[T]he Central Hudson standard does not permit us to supplant the precise interests put forward by the State with other suppositions." Edenfield v. Fane, 507 U.S. 761, 768, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993). Although we agree that privacy may rise to the level of a substantial state interest, see, e.g., Went For It, 515 U.S. at 625, 115 S.Ct. 2371 ("Our precedents leave no room for doubt that 'the protection of potential clients' privacy is a substantial state interest' " (quoting Edenfield, 507 U.S. at 769, 113 S.Ct. 1792)), the government cannot satisfy the second prong of the Central Hudson *1235 test by merely asserting a broad interest in privacy. It must specify the particular notion of privacy and interest served. Moreover, privacy is not an absolute good because it imposes real costs on society.

[FN7] Therefore, the specific privacy interest must be substantial, demonstrating that the state has considered the proper balancing of the benefits and harms of privacy. In sum, privacy may only constitute a substantial state interest if the government specifically articulates and properly justifies it.

FN7. Professor Cate lists a number of costs privacy imposes. For example, privacy "facilitates the dissemination of false information," by making it more difficult for individuals and institutions to discover falsities. Cate, supra, at 28. Privacy also "protects the withholding of relevant true information," such as when an employee fails to disclose a medical condition that would affect his or her job performance. Id. In addition, privacy interferes with the collection, organization, and storage of information which can assist businesses in making rapid, informed decisions and efficiently marketing their products or services. In this sense, privacy may lead to reduced productivity and higher prices for those products or services. See id. at 28-29. Privacy may even threaten physical safety by interfering with the public's ability to access information needed to protect themselves, such as whether an individual has a history of child abuse or molestation, sexual offenses, or communicable diseases. See id. at 29. Finally, privacy impedes upon individual voyeuristic curiosity which "opens people's eyes to opportunities and dangers." Id. at 29-30.

In the context of a speech restriction imposed to protect privacy by keeping certain information confidential, the government must show that the dissemination of the information desired to be kept private would inflict specific and significant harm on individuals, such as undue embarrassment or ridicule, intimidation or harassment, or misappropriation of sensitive personal information for the purposes of assuming another's identity. Although we may feel uncomfortable knowing that our personal information is circulating in the world, we live in an open society where information may usually pass freely. A general level of discomfort from knowing that people can readily access information about us does not necessarily rise to the level of a substantial state interest under Central Hudson for it is not based on an identified harm.

Neither Congress nor the FCC explicitly stated what "privacy" harm s 222 seeks to protect against. The CPNI Order notes that "CPNI includes information that is extremely personal to customers ... such as to whom, where, and when a customer places a call, as well as the types of service offerings to which the customer subscribes," CPNI Order at p 2, and it summarily finds "call destinations and other details about a call ... may be equally or more sensitive [than the content of the calls]," id. at p 94. The government never states it directly, but we infer from this thin justification that disclosure of CPNI information could prove embarrassing to some and that the government seeks to combat this potential harm.

We have some doubts about whether this interest, as presented, rises to the level of "substantial." We would

prefer to see a more empirical explanation and justification for the government's asserted interest. Cf. Went For It, 515 U.S. at 630, 115 S.Ct. 2371 (describing the record provided by the Bar cataloguing citizen outrage at being solicited just after injury or family tragedy). In addition, the authority relied upon by the government, Edenfield v. Fane, recognizes a state's interest in protecting against unwanted intrusions caused by solicitations, see 507 U.S. at 769, 113 S.Ct. 1792; see also Went For It, 515 U.S. at 625, 115 S.Ct. 2371, but it says nothing about the disclosure of allegedly sensitive information. On the other hand, we recognize the government may have a legitimate interest in helping protect certain information. Cf. Lanphere & Urbaniak v. Colorado, 21 F.3d 1508, 1514 (10th Cir.1994) (finding a substantial state interest in the need to protect the privacy of those charged with traffic offenses and DUI against dissemination of charging information for commercial purposes). Therefore, notwithstanding our reservations, *1236 we assume for the sake of this appeal that the government has asserted a substantial state interest in protecting people from the disclosure of sensitive and potentially embarrassing personal information. [FN8]

FN8. In its brief and at oral argument, the FCC intimated that consumer privacy concerns might also encompass an interest in preventing the customer intrusion that accompanies broad use of CPNI for telemarketing purposes. However, this particular privacy justification is lacking from the FCC record. In fact, the only reference to marketing intrusion into customer privacy comes in paragraph 100 of the CPNI Order in response to

> U.S. West's attempts to explain why it had such difficulty obtaining authorization to use CPNI in a telemarketing and direct-mail study it conducted. In paragraph 100, the FCC stated:
> [E]ven if U S WEST is correct, and customers do not grant approval simply because they do not want to be marketed to, this finding would not support permitting notice and opt-out. Indeed, it would suggest, as MCI observes, that contrary to U S WEST's claim, customers do not want to hear about "expanding service offerings," and in particular do not want their CPNI used towards that end. CPNI Order p 100. Such a terse statement, made only in the limited context of refuting U.S. West's expansive reading of its prior market study, provides insufficient evidence that the FCC sought to promote customer privacy by limiting intrusion into customer households through telemarketing made possible by CPNI sharing.

We harbor different reservations about the government's asserted interest in competition. While we afford agencies broad deference in interpreting a statute they are charged to administer, they must obey the dictates of Congress and administer the statute true to Congress' intent. See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213-14, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976). We are not satisfied that the interest in promoting competition was a significant consideration in the enactment of s 222.

While the broad purpose of the Telecommunications Act of 1996 is to foster increased competition in the

telecommunications industry, [FN9] the language of s 222 reveals no such concern. [FN10] Rather, the specific and dominant purpose of s 222 is the protection of customer privacy. Indeed, the FCC and members of Congress characterize s 222 as "striv[ing] to balance both the competitive and consumer privacy interests with respect to CPNI," Joint Statement of Managers, S. Conf. Rep. No. 104-230, at 205 (1996) (emphasis added), which suggests that s 222's purpose in fostering privacy may even run counter to the broad pro-competition purpose of the Telecommunications Act. In any event, three other considerations persuade us that Congress did not intend for competition to be a significant purpose of s 222. First, and most important, the plain language of the section deals almost exclusively with privacy. Section 222 is entitled "Privacy of customer information" and is replete with references to privacy and confidentiality of customer information. In contrast, s 222 contains no explicit mention of competition. Although s 222(c)(3) and s 222(e) impose nondiscrimination requirements with respect to disclosure *1237 of aggregate customer and subscriber list information which could be construed as pro-competition measures, we find that these do not sufficiently indicate that increasing competition was a purpose of s 222. Moreover, the provisions of s 222 relating to CPNI which the challenged regulations interpret contain no reference to nondiscrimination requirements and reflect solely a concern for customer privacy. See 47 U.S.C. s 222(c)(1)-(2), (d). Second, s 222 differs from previous CPNI restrictions designed to foster competition because it applies to all telecommunications carriers, not just the dominant ones. This indicates a different purpose for the new restriction.

Finally, s 222 contains measures that will allow full use, disclosure, and access to CPNI if customer approval is obtained. Assuming that a carrier is able to obtain a high rate of customer approval, the alleged competitive effect of s 222's CPNI restrictions is minimal and can perhaps even be nullified. Consequently, we find that Congress' primary purpose in enacting s 222 was concern for customer privacy, not the broader purpose of increasing competition.

FN9. The preamble to the Act states: "An act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub.L. No. 104-104, 110 Stat. 56, 56 (1996).

FN10. While the broad purposes of an Act frequently provide useful insight into the purposes served by a narrow provision of the Act, blind adherence to broad purposes can obfuscate Congress' true intent regarding a particular provision, particularly when that provision has an unambiguous, specific, and dominant purpose. See Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 373-74, 106 S.Ct. 681, 88 L.Ed.2d 691 (1986) ("Application of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action.... Invocation of

> the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.").

Even though we conclude that competition did not constitute the primary purpose of the section, we recognize that Congress may not have completely ignored competition in drafting s 222. While we believe that the asserted interest in increasing competition would not suffice, by itself, to justify the FCC's rule, we will, in this case, consider it in concert with the government's interest in protecting consumer privacy.

b. Does the Regulation Directly and Materially Advance the State's Interests?

Under the next prong of Central Hudson, the government must "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." Edenfield v. Fane, 507 U.S. 761, 771, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993); accord Rubin v. Coors Brewing Co., 514 U.S. 476, 487, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995). "This burden is not satisfied by mere speculation or conjecture." Edenfield, 507 U.S. at 770, 113 S.Ct. 1792. On the record before us, the government fails to meet its burden. The government presents no evidence showing the harm to either privacy or competition is real. Instead, the government relies on speculation that harm to privacy and competition for new services will result if carriers use CPNI. In Edenfield, the Supreme Court struck down a Florida ban on CPA in-person solicitation because

the state had presented no evidence--anecdotal or empirical--that such solicitation created the dangers of "fraud, overreaching, or compromised independence" that the state sought to combat. See 507 U.S. at 771, 113 S.Ct. 1792; cf. Florida Bar v. Went For It, Inc., 515 U.S. 618, 626-27, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995) (upholding restriction on solicitation of accident victims within thirty days of accident, based on two- year study and written report analyzing statistically and anecdotally the impacts of such solicitation). The FCC faces the same problem here. While protecting against disclosure of sensitive and potentially embarrassing personal information may be important in the abstract, we have no indication of how it may occur in reality with respect to CPNI. Indeed, we do not even have indication that the disclosure might actually occur. The government presents no evidence regarding how and to whom carriers would disclose CPNI. By its own admission, the government is not concerned about the disclosure of CPNI within a firm. See CPNI Order at p 55, n. 203 ("[W]e agree ... that sharing of CPNI within one integrated firm does not raise significant privacy concerns because customers would not be concerned with having their CPNI disclosed within a firm in order to receive increased competitive offerings."). Yet the government has not explained how or why a carrier would disclose CPNI to outside parties, especially when the government claims CPNI is information that would give one firm a competitive advantage over another. This *1238 leaves us unsure exactly who would potentially receive the sensitive information.

Similarly, the FCC can theorize that allowing existing carriers to market new services with CPNI will impede competition for those services, but it provides no analysis of how or if this might actually occur. Beyond its own speculation, the best the government can offer is that "[t]he vigor of U.S. West's protests against the rules ... indicates that U.S. West also believes that this restriction will be effective in promoting Congress's competitive interest." Appellees Br. at 30. This is simply additional conjecture, and it is inadequate to justify restrictions under the First Amendment. See Edenfield, 507 U.S. at 770-71, 113 S.Ct. 1792.

c. Are the CPNI regulations narrowly tailored?

Even assuming, arguendo, that the state interests in privacy and competition are substantial and that the regulations directly and materially advance those interests, we do not find, on this record, the FCC rules regarding customer approval properly tailored. The CPNI regulations must be "no more extensive than necessary to serve [the stated] interest[s]." Rubin, 514 U.S. at 486, 115 S.Ct. 1585. In order for a regulation to satisfy this final Central Hudson prong, there must be a fit between the legislature's means and its desired objective--"a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989) (internal quotation marks omitted). While clearly the government need not employ the least restrictive means to accomplish its goal, it must utilize a

means that is "narrowly tailored" to its desired objective. Id.; Florida Bar v. Went For It, Inc., 515 U.S. 618, 632, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995). Narrow tailoring means that the government's speech restriction must signify a "carefu[l] calculat[ion of] the costs and benefits associated with the burden on speech imposed by its prohibition." Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993) (internal quotation marks omitted). "The availability of less burdensome alternatives to reach the stated goal signals that the fit between the legislature's ends and the means chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny." 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 529, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996) (O'Connor, J., concurring); see also, e.g., Romer v. Evans, 517 U.S. at 632, 116 S.Ct. 1620; Rubin, 514 U.S. at 490-91, 115 S.Ct. 1585; Discovery Network, 507 U.S. at 417 n. 13, 113 S.Ct. 1505. This is particularly true when such alternatives are obvious and restrict substantially less speech. [FN11] See Fox, 492 U.S. at 479, 109 S.Ct. 3028 ("[A]lmost all of the restrictions disallowed under Central Hudson 's fourth prong have been substantially excessive, disregarding 'far less restrictive and more precise means.' " (quoting Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 476, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988)).

FN11. While this pronouncement, in effect, imposes a burden on the government to consider certain less restrictive means--those that are obvious and restrict substantially less speech--it does not amount to a least restrictive means test. We do not require the government to consider

> every conceivable means that may restrict less speech and strike down regulations when any less restrictive means would sufficiently serve the state interest. We merely recognize the reality that the existence of an obvious and substantially less restrictive means for advancing the desired government objective indicates a lack of narrow tailoring.

It is difficult, if not impossible, for us to conduct a full and proper narrow tailoring analysis, given the deficiencies that we have already encountered with respect to the previous portions of the Central Hudson test. Nevertheless, on this record, the FCC's failure to adequately consider an obvious and substantially less restrictive alternative, an opt-out strategy, indicates that it did not narrowly *1239 tailor the CPNI regulations regarding customer approval. The respondents argue that the record contains adequate support that the CPNI regulations are narrowly tailored because a study conducted by petitioner U.S. West shows that a majority of individuals, when affirmatively asked for approval to use CPNI, refused to grant it. The U.S. West study shows that 33% of those called refused to grant approval to use their CPNI, 28% granted such approval, and 39% either hung up or asked not to be called again. See CPNI Order p 99 n. 380. Additionally, U.S. West secured a 72% affirmative response rate from customers whom it solicited after they initiated contact with the company for some other reason. [FN12] See id. p 99 n. 378. This study does not provide sufficient evidence that customers do not want carriers to use their CPNI. The results may simply reflect that a substantial

number of individuals are ambivalent or disinterested in the privacy of their CPNI or that consumers are averse to marketing generally. The FCC stated that the study supported "an equally plausible interpretation ... that many customers value the privacy of their personal information and do not want it shared for purposes beyond the existing service relationship." CPNI Order p 100. We are not convinced that the study supports the FCC's interpretation, and the FCC provides no additional evidence to bolster its argument.

> FN12. U.S. West also solicited approval from customers by mail. Only six to eleven percent of residential customers and only five to nine percent of business customers responded to the direct mail trial. See CPNI Order p 99 n. 378.

Even assuming that telecommunications customers value the privacy of CPNI, the FCC record does not adequately show that an opt-out strategy would not sufficiently protect customer privacy. The respondents merely speculate that there are a substantial number of individuals who feel strongly about their privacy, yet would not bother to opt-out if given notice and the opportunity to do so. Such speculation hardly reflects the careful calculation of costs and benefits that our commercial speech jurisprudence requires. Finally, respondents assert that under FCC v. National Citizens Comm. for Broad., 436 U.S. 775, 98 S.Ct. 2096, 56 L.Ed.2d 697 (1978), the FCC can rely upon its common sense judgment based on experience, notwithstanding the inclusiveness of the rulemaking record. We refuse to extend the rule announced in National Citizens

in the manner respondents suggest. National Citizens involved agency conclusions regarding "elusive concepts, not easily defined let alone measured without making qualitative judgments," id. at 796-97, 98 S.Ct. 2096 (internal quotation marks omitted), and information that was difficult to compile. We see no such problems in this case. Furthermore, in National Citizens, the FCC's common sense judgment only supported a finding that it "acted rationally" in promulgating a rule. Id. at 796, 98 S.Ct. 2096. The burden under the fourth prong of Central Hudson is significantly higher. The FCC must not only demonstrate that it acted rationally, but that it narrowly tailored its regulations to meet its stated goals.

In sum, even assuming that respondents met the prior two prongs of Central Hudson, we conclude that based on the record before us, the agency has failed to satisfy its burden of showing that the customer approval regulations restrict no more speech than necessary to serve the asserted state interests. [FN13] Consequently, we find that the CPNI regulations interpreting the customer approval requirement of 47 U.S.C. s 222(c) violate the First Amendment. [FN14]

FN13. We reiterate that even if the opt-in approach is narrowly tailored with respect to protecting competition, the interest advanced in protecting competition here is insufficient by itself to justify the CPNI regulations under the Central Hudson test. See supra Part III.B.3.a.

FN14. Because we vacate the CPNI restrictions on First Amendment grounds, we need not address whether they have effected a "taking" under the Fifth Amendment or whether they are otherwise arbitrary and capricious.

*1240 IV. Conclusion

The FCC failed to adequately consider the constitutional implications of its CPNI regulations. Even if we accept the government's proffered interests and assume those interests are substantial, the FCC still insufficiently justified its choice to adopt an opt-in regime. Consequently, its CPNI regulations must fall under the First Amendment. At the very least, the foregoing analysis shows that the CPNI regulations clearly raise a serious constitutional question, invoking the rule of constitutional doubt. Accordingly, we VACATE the FCC's CPNI Order and the regulations adopted therein. [FN15]

FN15. The dissent accuses us of "advocating" an opt-out approach. We do not "advocate" any specific approach. We merely find fault in the FCC's inadequate consideration of the approval mechanism alternatives in light of the First Amendment.

**DISSENTING OPINION**

BRISCOE, Circuit Judge, dissenting:

I respectfully dissent. When properly considered, neither of the constitutional challenges asserted by U.S. West warrants setting aside the FCC's CPNI Order, which I believe represents a reasonable interpretation of 47 U.S.C. s 222. I would therefore deny the petition for review and affirm the CPNI Order.

I.

Before addressing U.S. West's challenges to the CPNI Order, I begin by briefly recounting how this dispute arose. In 1996, Congress decided to place restrictions on the use of CPNI collected by telecommunications carriers. In particular, Congress chose to require carriers to obtain customer approval prior to using, disclosing, or allowing access to individually identifiable CPNI. See 47 U.S.C. s 222. Following enactment of s 222, the FCC received several informal requests from members of the telecommunications industry for guidance in interpreting the statute's customer approval requirement. The FCC responded by issuing a Notice of Proposed Rulemaking "tentatively conclud[ing] ... that regulations interpreting and specifying in greater detail a carrier's obligations under section 222 would be in the public interest," and seeking public comment on various aspects of s 222, including the statute's customer approval requirement. CPNI Order, at 12.

On February 26, 1998, the FCC issued its CPNI Order interpreting s 222's customer approval requirements. In pertinent part, the FCC concluded s 222 was ambiguous in that it did "not specify what kind of approval [wa]s required" to be obtained by a carrier prior to use of individually identifiable CPNI. Id. at 67. In resolving this ambiguity, the FCC noted that interested parties (including U.S. West) had "offer[ed] three separate views, ranging from a most restrictive interpretation that would require approval to be in writing, to a permissive one, where carriers merely would need to provide customers with a notice of their intent to use CPNI, and a mechanism for customers to 'opt- out' from this proposed use (notice and opt-out)." Id. After weighing these proffered options, the FCC adopted an "opt-in" approach whereby carriers must "give customers explicit notice of their CPNI rights prior to any solicitation for approval," and then must obtain from the customer "express written, oral, or electronic approval for CPNI uses." Id. at 68.

Dissatisfied with the FCC's selection of the "opt-in" approach, rather than its suggested opt-out approach (which is allegedly cheaper and results in a higher "approval" rate than the opt-in approach), U.S. West filed this action challenging the validity of the FCC's CPNI Order. In particular, U.S. West contends the portion of the CPNI Order interpreting s 222's approval requirement violates the First and Fifth Amendments of the United States Constitution. [FN1] US West also contends that portion *1241 of the CPNI Order is "a gratuitously severe construction" of s 222.

FN1. This litigation strategy is apparently not unique to this case. In another case filed in this circuit involving substantially different facts, U.S. West asserted strikingly similar constitutional arguments. See U.S. West, Inc. v. Tristani, 182 F.3d 1202 (10th Cir.1999) (asserting First and Fifth Amendment challenges to rate order of the New Mexico State Corporation Commission).

II.

"United States Courts of Appeals have been granted exclusive statutory jurisdiction to review the FCC's final orders pursuant to 28 U.S.C. s 2342(1) (1994) and 47 U.S.C. s 402(a) (1994)." Iowa Utilities Bd. v. FCC, 120 F.3d 753, 793 (8th Cir.1997), aff'd in part and rev'd in part, 522 U.S. 1089, 118 S.Ct. 879, 139 L.Ed.2d 867 (1998). In reviewing the CPNI Order at issue in this case, which represents the FCC's construction of a statute it is charged with administering, we are initially "confronted with two questions." Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). "First, always, is the question whether Congress has directly spoken to the precise question at issue." Id. "If the intent of Congress is clear, that is the end of the matter; for [we], as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. at 842-43, 104 S.Ct. 2778. "If, however, [we] determine[ ] Congress has not directly addressed the precise question at issue, [we] do[ ] not simply impose [our] own construction on the statute." Id. at 843, 104 S.Ct. 2778.

"Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for [us] is whether the agency's answer is based on a permissible construction of the statute." Id.

In my view, s 222, in particular subsection (c)(1), is unambiguous in the sense that Congress made it abundantly clear it intended for telecommunications carriers to obtain customer "approval" prior to using, disclosing, or permitting access to individually identifiable CPNI. Although Congress did not specifically define the term "approval" in the statute, its ordinary and natural meaning clearly "implies knowledge and exercise of discretion after knowledge." Black's Law Dictionary at 102 (6th ed.1990); see United States v. Roberts, 88 F.3d 872, 877 (10th Cir.1996) (if Congress does not define statutory term, "its common and ordinary usage may be obtained by reference to a dictionary"); United States v. Floyd, 81 F.3d 1517, 1523 (10th Cir.1996) ("In interpreting Congressional intent, a reviewing court must determine whether the language used in a statute is ambiguous, or whether it has an ordinary meaning."). In other words, it is clear from the statute that Congress intended for customers to make an informed decision as to whether they would allow their individually identifiable CPNI to be used. [FN2]

FN2. US West does not deny that the statute requires it to obtain informed consent from each of its customers regarding their individually identifiable CPNI.

The remaining issue is whether the statute indicates the precise method a carrier must use to obtain customer approval. On this point, I agree with the FCC that the statute is ambiguous. See CPNI Order at 70. Although it is clear from the statute that a customer must be made aware of his or her rights regarding CPNI and be allowed to make an informed decision regarding its use, the statute is silent with respect to precisely how a carrier must obtain this approval from its customers. The question therefore becomes whether the FCC's construction of the statute (to remedy the ambiguity) is reasonable. In deciding this question, we "may not substitute [our] own construction of [the] statutory provision for a reasonable interpretation made by the" FCC. Chevron, 467 U.S. at 844, 104 S.Ct. 2778.

Because the approval requirement imposed by Congress in s 222 is fairly rigorous in that it requires customer knowledge and exercise of discretion after knowledge, the methods available for obtaining such approval were obviously limited. Indeed, the CPNI Order indicates interested parties proposed only three possible methods for obtaining approval: (1) requiring express *1242 written approval, (2) requiring express written, oral, or electronic approval (the opt-in method), or (3) requiring only implied approval by allowing carriers to notify customers of their intent to use CPNI and affording customers a mechanism to "opt-out" if they did not want their CPNI to be used (the opt-out method). After quickly disposing of the most restrictive of these three options (i.e., the method requiring express written approval) [FN3], the FCC carefully weighed the advantages and disadvantages of

the two remaining options, i.e., the opt-in and the opt-out approaches. CPNI Order at 67-85. Ultimately, the FCC concluded the opt-in approach was best suited to forwarding the purpose of the statute:

> FN3. See CPNI Order at 87 ("Given that nothing in section 222(c)(1) expressly limits approval to only written means, we conclude that carriers should be given flexibility to secure approval through written, oral or electronic methods.").
>
> We conclude ... that an express approval mechanism is the best means to implement [s 222's approval requirement] because it will minimize any unwanted or unknowing disclosure of CPNI. In addition, such a mechanism will limit the potential for untoward competitive advantages by incumbent carriers. Our conclusion is guided by the natural, common sense understanding of the term "approval," which we believe generally connotes an informed and deliberate response. An express approval best ensures such a knowing response. In contrast, under an opt-out approach, ... because customers may not read their CPNI notices, there is no assurance that any implied consent would be truly informed. We agree with the observations of MCI and Sprint that, insofar as customers may not actually consider CPNI notices under a notice and opt-out approach, they may be unaware of the privacy protections afforded by section 222, and may not understand that they must take affirmative steps to restrict access to

> sensitive information. We therefore find it difficult to construe a customer's failure to respond to a notice as constituting an informed approval of its contents. Accordingly, we adopt a mechanism of express approval because we find that it is the best means at this time to achieve the goal of ensuring informed customer approval. Id. at 70-71.

After reviewing the CPNI Order and the administrative record, I am convinced the FCC's interpretation of s 222, more specifically its selection of the opt-in method for obtaining customer approval, is entirely reasonable. Indeed, the CPNI Order makes a strong case that, of the two options seriously considered by the FCC, the opt-in method is the only one that legitimately forwards Congress' goal of ensuring that customers give informed consent for use of their individually identifiable CPNI. Accordingly, in applying the rubric set forth in Chevron, and barring any serious constitutional problems posed by the CPNI Order, we must defer to the FCC's selection of the opt-in method in resolving the statutory ambiguity presented in this case.

III.

Having concluded the CPNI Order is worthy of deference under the standards outlined in Chevron, I now turn to the constitutional challenges asserted by U.S. West. See Rust v. Sullivan, 500 U.S. 173, 190, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) (reviewing challenged regulation under Chevron standards before addressing plaintiff's

constitutional challenges). It is true that courts need not defer to an agency's interpretation of a federal statute if that interpretation raises serious constitutional questions. See DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council, 485 U.S. 568, 574, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988) (although NLRB's interpretation of NLRA was normally entitled to deference, Court refused to defer in this instance because the NLRB's interpretation raised serious First Amendment issues). This canon of *1243 statutory construction, however, is not applied in every case where an agency interpretation is challenged on constitutional grounds. Rather, "courts [should] scrutinize constitutional objections to a particular agency interpretation skeptically," and "[o]nly if the agency's proffered interpretation raises serious constitutional concerns [should] a court refuse to defer under Chevron." Williams v. Babbitt, 115 F.3d 657, 662 (9th Cir.1997) (italics in original), cert. denied, --- U.S. ----, 118 S.Ct. 1795, 140 L.Ed.2d 936 (1998); see Rust 500 U.S. at 191-92, 111 S.Ct. 1759 (although regulations were challenged on constitutional grounds, Court granted Chevron deference to regulations and addressed constitutional question on the merits); Republican Nat'l Comm. v. Federal Election Comm'n, 76 F.3d 400, 409 (D.C.Cir.1996) (court applied Chevron deference because it was able to "easily resolve ... First Amendment challenges [to the regulation] through the application of controlling precedent"). In short, "constitutional narrowing should displace Chevron only when the constitutional problems are truly 'grave' and never when it would effectively preclude all policy options because all possible interpretations raise constitutional problems." Williams, 115 F.3d at 663.

For the reasons that follow, I conclude neither of the constitutional challenges asserted by U.S. West is serious enough to warrant abandoning the traditional deference we grant agency interpretations under Chevron.

First Amendment challenge

US West contends the CPNI Order "violates the First Amendment by requiring that carriers secure prior affirmative consents from customers before using individually identifiable customer information to speak with their customers on an individualized basis about services beyond the 'categories' of telecommunications services to which the currently subscribe." US West's Opening Brief at 22. In other words, U.S West suggests the CPNI Order unduly limits its ability to engage in commercial speech with its existing customers regarding new products and services it may offer. US West also claims the CPNI Order "restricts the ability of carriers to share and use CPNI internally- to have different divisions, affiliates, and personnel within the same carrier communicate information to each other (i.e., to speak to each other), absent a prior affirmative consent from the customer." Id.

The problem with U.S. West's arguments is they are more appropriately aimed at the restrictions and requirements outlined in 222 rather than the approval method adopted in the CPNI Order. As outlined above, it is the statute, not the CPNI Order, that prohibits a carrier from using, disclosing, or permitting access to individually identifiable CPNI without first obtaining informed consent

from its customers. Yet U.S. West has not challenged the constitutionality of s 222, and this is not the proper forum for addressing such a challenge even if it was raised. [FN4] Thus, we must assume the restrictions and requirements outlined in the statute are constitutional. More specifically, we must assume the statute's restrictions on the use of CPNI, and its requirement that a carrier obtain customer approval prior to using, disclosing, or permitting access to individually identifiable CPNI, do not violate the First Amendment.

FN4. I have found no authority that would allow us, in the context of reviewing the CPNI Order, to pass on the constitutionality of s 222. Indeed, the most this court can do is strike the CPNI Order, which would have no effect on the continued validity of the statute.

Focusing strictly, then, on the portion of the CPNI Order challenged by U.S. West, I find nothing that warrants First Amendment scrutiny. As previously noted, the portion of the CPNI Order at issue in this case simply adopts from an extremely limited range of choices the particular method a carrier must use in obtaining customer approval. In my view, nothing about this selection method, viewed alone, impacts expressive activity. At bottom, the CPNI Order narrowly impacts a carrier's nonexpressive *1244 activity by requiring it to obtain express, rather than implied, customer approval. The CPNI Order does not, however, directly impact a carrier's expressive activity (by, for example, limiting the manner in which a carrier can speak), nor does it indirectly impact a carrier's expressive

activity in such a manner as to warrant First Amendment scrutiny. See generally Arcara v. Cloud Books, Inc., 478 U.S. 697, 702-07, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986) (discussing when First Amendment scrutiny will and will not be applied to a statute).

Although the majority attempts to explain how the CPNI Order impacts U.S. West's free speech rights, its analysis is frustratingly vague. [FN5] Indeed, the majority's discussion of this critical point contains no reference to the opt-in method selected by the FCC in the CPNI Order. Instead, the majority strays from the narrow scope of the CPNI Order and effectively takes into account the statutory restrictions on CPNI usage. Unfortunately, this error permeates not only the majority's threshold analysis of whether the CPNI Order implicates U.S. West's free speech rights, but its subsequent First Amendment analysis as well. [FN6]

FN5. Although the majority cites Florida Bar v. Went For It, Inc., 515 U.S. 618, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995) in support of its limited analysis, that case is quite different from the instant action. At issue in Went For It was a Florida Bar rule that restricted attorneys' use of direct mail advertisements; in other words, a rule that directly impacted attorneys' commercial speech. Here, in contrast, the CPNI Order does not directly affect any form of expressive activity engaged in by U.S. West or other telecommunications carriers.

FN6. It is difficult to tell from the majority's opinion where its analysis of the CPNI Order ends and its analysis of the statute begins. For much of the opinion, the majority appears to be reviewing the constitutionality of s 222 rather than the CPNI Order.

In order to highlight the deficiencies in the majority's First Amendment analysis, I will assume, for purposes of argument only, that the CPNI Order impacts a carrier's free speech rights in a manner sufficient to warrant First Amendment scrutiny. I will also accept, for purposes of the following discussion, the majority's conclusions that the speech affected by the CPNI Order is commercial speech subject to First Amendment analysis under the test outlined in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). As noted by the majority, protected commercial speech (i.e., commercial speech that is neither misleading nor unlawful) may be regulated only if "the government can show that (1) it has a substantial state interest in regulating the speech, (2) the regulation directly and materially advances that interest, and (3) the regulation is no more extensive than necessary to serve the interest." Revo v. Disciplinary Bd. of the Supreme Ct. of New Mexico, 106 F.3d 929, 932 (10th Cir.) (outlining Central Hudson test).

A review of s 222 indicates Congress had a two-fold interest in regulating the disclosure of CPNI: the protection of consumer privacy and the promotion of fair competition among telecommunications carriers. In my view, Supreme Court and circuit precedent clearly supports the conclusion

that both of these interests are "substantial" for First Amendment purposes. See, e.g., Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 117 S.Ct. 1174, 1186, 137 L.Ed.2d 369 (1997) (concluding federal government had substantial interest in promoting fair competition in market for television programming); Went For It, 515 U.S. at 624-25, 115 S.Ct. 2371 (concluding Florida Bar Association had substantial interest in protecting privacy of personal injury victims by prohibiting invasive and unsolicited contact by lawyers); Van Bergen v. State of Minnesota, 59 F.3d 1541, 1555 (8th Cir.1995) (concluding government had substantial interest, motivated by protecting consumer privacy, in limiting use of unsolicited sales calls by auto dialing/announcing devices); Lanphere & Urbaniak v. *1245 State of Colorado, 21 F.3d 1508, 1514-15 (10th Cir.1994) (concluding government had substantial interest in protecting privacy of persons charged with misdemeanor traffic offenses and DUI); Curtis v. Thompson, 840 F.2d 1291, 1300 (7th Cir.1988) ("When the fundamental right to privacy clashes with the right of free expression, the interest in privacy does not play second fiddle when the speech is merely intended to propose a commercial transaction.").

Although the majority ultimately accepts Congress' interest in protecting customer privacy, it does so only after disparaging that interest and offering its own views concerning the advantages and disadvantages of protecting the privacy of consumer information. "Judges are not experts in the field [being regulated], and are not part of either political branch of the Government." Chevron, 467 U.S. at 865, 104 S.Ct. 2778. The majority also criticizes the FCC for failing to offer "a more empirical explanation

and justification" for the privacy interest. Majority Opinion at 21. The problem with this criticism is that, once again, the majority ignores the procedural context of this case. The privacy interest did not originate with the FCC or the CPNI Order; rather, it originated with Congress when it enacted the restrictions outlined in s 222. Precisely how the FCC could have or, for that matter, why it would have included in the administrative record "more empirical explanation and justification" for an interest that originated with Congress, and thus predated the administrative process in this case, is unclear. [FN7] As an administrative agency, and not an independent branch of government, the FCC was obligated to implement without question Congress' directive to require some form of customer approval.

> FN7. The majority holding presents a serious dilemma for the FCC. Because U.S. West has not challenged the constitutionality of s 222, carriers remain statutorily bound to obtain customer "approval" prior to using, disclosing, or granting access to individually identifiable CPNI. Further, the question of how this approval is to be obtained remains open. Thus, it would seem that, in light of the majority's opinion, the FCC must again attempt to formulate a method for obtaining such approval. It is unclear whether the FCC will now effectively be bound to adopt the opt-out method advocated by U.S. West and the majority.

Even more disturbingly, the majority rejects outright any Congressional interest in promoting competition.

Although I agree protection of customer privacy is perhaps the dominant purpose of s 222, it is impossible to ignore the fact that s 222 was enacted as part of the Telecommunications Act of 1996, the entire purpose of which was "[t]o promote competition ... in order to secure lower prices and higher quality services for American telecommunications consumers." Pub.L. No. 104-104, 110 Stat. 56, 56 (1996); see In re Graven, 936 F.2d 378, 385 (8th Cir.1991) (when interpreting statute, court looks not only to its express language, but also to overall purpose of act of which it is a part). Indeed, the notion that promotion of competition was one of Congress' purposes in enacting s 222 is entirely consistent with the plain language of the statute itself. By restricting carriers' usage of CPNI, s 222 helps diminish anticompetitive barriers in the telecommunications market by requiring carriers (both large and small) to rely on methods other than analysis of existing CPNI to promote their products, and thereby reduces the possibility that a carrier will easily convert its existing customers for a particular product or service into customers for its new products or services.

Turning to the next prong of Central Hudson, I conclude the restrictions outlined in s 222 directly and materially advance Congress' twin interests of protecting customer privacy and promoting competition. By preventing a carrier from using, disclosing, or permitting access to individually identifiable CPNI without customer approval, s 222 directly promotes the goal of protecting customer privacy. Indeed, s 222 arguably promotes the First Amendment rights of consumers by allowing them to call *1246 whom they wish when they wish without fear

that their calling records will be disclosed to others. Likewise, s 222's limitations on the use of CPNI appear to promote competition by "leveling the playing field" among carriers offering new types of telecommunications markets. For example, s 222 makes it more difficult for a large long-distance carrier (such as AT & T) to develop an immediate monopoly in a new telecommunications market (e.g., PCS) by limiting its use of CPNI obtained from its long-distance customers.

In addressing this prong of Central Hudson, the majority once again ignores the procedural context of the case and criticizes the FCC for "present [ing] no evidence showing the harm to either privacy or competition is real." Majority Opinion at 25. As stated above, because the two interests originated with Congress and thus predated the administrative process that led to the issuance of the CPNI Order, it is unclear precisely what the majority believes the FCC should have done to bolster the administrative record. Indeed, I submit it was wholly unnecessary for the FCC to collect or consider any evidence regarding these two Congressional interests. Instead, the FCC's much more narrow responsibility, which I believe it reasonably fulfilled, was to fill in the gaps left by Congress when it enacted s 222.

Finally, I turn to the last prong of Central Hudson, which asks whether the restrictions at issue are narrowly tailored to achieving the government's interests. In Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989), the Supreme Court emphasized the "fit" between the restrictions and the

governmental interests need not be "necessarily perfect, but reasonable." In other words, the restrictions do not have to represent "the single best disposition but one whose scope is in proportion to the interest served." Id. Before addressing the CPNI Order, I again note U.S. West has not challenged s 222, and has thus effectively conceded the requirement of customer approval is narrowly tailored to achieving the interests of privacy and competition. As for the CPNI Order itself, I am convinced it is also narrowly tailored to achieving these same interests. The administrative record convincingly demonstrates that, of the limited options available to the FCC, the opt-in method of obtaining customer approval was the most reasonable solution. As the FCC concluded in the CPNI Order, the method of implied approval suggested by U.S. West (i.e., the opt-out method) did not ensure that the Congressional goal of informed customer consent would be satisfied. As for the two express methods of approval available to it, the FCC chose the least restrictive method available. More specifically, the FCC rejected the express written approval method as too restrictive, and adopted the opt-in method which allows carriers to obtain express written, oral, or electronic approval from customers. Ultimately, I conclude the FCC's selection satisfies the last Central Hudson prong because it represents a "carefu[l] calculat[ion of] the costs and benefits associated with the burden on speech imposed by its prohibition." Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993) (internal quotation marks omitted).

The majority, focusing at this point on the CPNI Order rather than the statute, concludes the FCC failed to

adequately consider the opt-out method, which the majority characterizes as "an obvious and substantially less restrictive alternative" than the opt-in method. Majority Opinion at 29. Notably, however, the majority fails to explain why, in its view, the opt-out method is substantially less restrictive. Presumably, the majority is relying on the fact that the opt-out method typically results in a higher "approval" rate than the opt-in method. Were mere "approval" percentages the only factor relevant to our discussion, the majority would perhaps be correct. As the FCC persuasively concluded in the CPNI Order, however, the opt-out method simply does not comply with s 222's requirement of informed consent. *1247 In particular, the opt-out method, unlike the opt-in method, does not guarantee that a customer will make an informed decision about usage of his or her individually identifiable CPNI. To the contrary, the opt-out method creates the very real possibility of "uninformed" customer approval. In the end, I reiterate my point that the opt-in method selected by the FCC is the only method of obtaining approval that serves the governmental interests at issue while simultaneously complying with the express requirement of the statute (i.e., obtaining informed customer consent).

In summary, as U.S. West has not challenged the constitutionality of s 222, there is no need to subject the CPNI Order to First Amendment scrutiny. Even assuming, arguendo, such scrutiny is required, I conclude the CPNI Order does not violate U.S. West's First Amendment rights. In my view, U.S. West has not posed a "grave" First Amendment challenge to the CPNI Order.

Fifth Amendment challenge

U.S. West also contends the FCC's restrictions on the disclosure of CPNI are so severe they constitute a regulatory taking of property without just compensation, in violation of the Takings Clause of the Fifth Amendment. As with its First Amendment claim, U.S. West is again, in my view, aiming at the statutory restrictions rather than the narrow portion of the CPNI Order at issue in this case. Even assuming, for purposes of argument, that U.S. West's "takings" argument is focused solely on the CPNI Order, I find no merit to it. [FN8]

FN8. I find U.S. West's takings claim inconsistent with its First Amendment claim. In particular, the more accessible CPNI is to various employees within the company, the less likely it is that CPNI will be deemed a trade secret and thereby be entitled to protection under the Fifth Amendment's Taking Clause. Moreover, if CPNI is disclosed to outside companies, it would clearly lose any protection as a trade secret and would not be considered property protectable under the Fifth Amendment.

The Fifth Amendment provides, in pertinent part: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. "The purpose of the Fifth Amendment is to prevent the '[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " 767 Third Avenue Assoc. v. United States, 48 F.3d 1575, 1580 (Fed.Cir.1995) (quoting Penn

Central Transp. Co. v. New York City, 438 U.S. 104, 123, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978)). In addressing U.S. West's takings argument, the threshold question is whether CPNI constitutes "property" for purposes of the Takings Clause. US West gives short shrift to this issue, arguing the decision in Ruckelshaus v. Monsanto Co., 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984), establishes that CPNI is protectable property for purposes of the Takings Clause. In Monsanto, plaintiff Monsanto, a pesticide manufacturer doing business in Missouri, filed suit challenging certain amendments to the Federal Insecticide, ungicide, and Rodenticide Act (FIFRA), 7 U.S.C. s 136 et seq., requiring it to disclose to the EPA various health, environmental, and safety data related to its products. In addressing Monsanto's assertion that the challenged regulations constituted a takings under the Fifth Amendment, the Court held "that to the extent that Monsantoha[d] an interest in its health, safety, and environmental data cognizable as a trade secret property right under Missouri law, that property right [wa]s protected by the Taking Clause of the Fifth Amendment." 467 U.S. at 1003-04, 104 S.Ct. 2862.

Although Monsanto certainly sets the stage for treatment of CPNI as property for Fifth Amendment purposes, U.S. West has failed to take the requisite step of demonstrating that CPNI qualifies as trade secret property, or any other kind of protectable property interest, under state law. Therefore, there is no basis for concluding *1248 U.S. West has presented a "grave" or "serious" Fifth Amendment challenge to the CPNI Order.

IV.

In conclusion, I view U.S. West's petition for review as little more than a run-of-the-mill attack on an agency order "clothed by ingenious argument in the garb" of First and Fifth Amendment issues. Zemel v. Rusk, 381 U.S. 1, 16- 17, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965). Because there is no merit to those constitutional arguments, and because the FCC's CPNI Order is an entirely reasonable interpretation of 47 U.S.C. s 222, I would deny U.S. West's petition for review and affirm the CPNI Order.

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**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) |
| | ) |
| Implementation of the | ) |
| Telecommunications Act of 1996: | ) |
| | ) |
| Telecommunications Carriers' Use | ) |
| of Customer Proprietary Network | ) |
| Information and Other | ) |
| Customer Information | ) |
| | ) |
| Implementation of the Non-Accounting | ) |
| Safeguards of Sections 271 and 272 of the | ) |
| Communications Act of 1934, as Amended | ) |
| | ) |

CC Docket No. 96-115
CC Docket No. 96-149

**SECOND REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING**

**Adopted: February 19, 1998**
**Released: February 26, 1998**

Comment Date: March 30, 1998
Reply Comment Date: April 14, 1998

By the Commission: Commissioner Ness approving in part; dissenting in part and issuing a statement.

## I. INTRODUCTION AND EXECUTIVE SUMMARY

1. In passing the Telecommunications Act of 1996 (1996 Act),[1] Congress sought to establish a new "pro-competitive, deregulatory national policy framework"[2] that would replace the statutory and regulatory limitations on competition within and between markets. Congress recognized, however, that the new competitive market forces and technology ushered in by the 1996 Act had the potential to threaten consumer privacy interests. Congress, therefore, enacted section 222 to prevent consumer privacy protections from being inadvertently swept away along with the prior limits on competition.[3] Section 222 establishes a new statutory framework governing carrier use and disclosure of customer proprietary network information (CPNI) and other customer information obtained by carriers in their provision of telecommunications services.

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act) (codified at 47 U.S.C. § § 151 *et seq.*). Hereinafter, all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code. The 1996 Act amended the Communications Act of 1934. We will refer to the Communications Act of 1934, as amended, as "the Communications Act" or "the Act."

[2] Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess., 1 (1996) (Joint Explanatory Statement).

[3] Representative Markey, the original sponsor of the "Telephone Consumer Privacy Protection Act of 1993," which was the first iteration of what ultimately evolved into section 222, explained: "As recent events have made clear, we are undoubtedly in a full-fledged technological revolution. This revolution promises exciting new services and products that will change the way we live, work, and play . . . . If adequate safeguards are not in place to protect consumers, however, the same technology that serves to empower individuals can

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2. Section 222 sets forth three categories of customer information to which different privacy protections and carrier obligations apply -- individually identifiable CPNI, aggregate customer information, and subscriber list information.[4] CPNI includes information that is extremely personal to customers as well as commercially valuable to carriers, such as to whom, where and when a customer places a call, as well as the types of service offerings to which the customer subscribes and the extent the service is used.[5] Aggregate customer and subscriber list information, unlike individually identifiable CPNI, involve customer information that is not private or sensitive, but like CPNI, is nevertheless valuable to competitors. Aggregate customer

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also imperil them by fostering and abetting invasions of personal privacy. The legislation I am introducing today will ensure that the fundamental privacy rights of each American will be protected even as this new era of communications becomes ever more sophisticated and ubiquitously deployed." Extension of Remarks of Edward J. Markey, 139 Cong. Rec. E2745-01.

[4] Sections 222(a) and (b) also establish obligations and restrictions in connection with carrier proprietary information. The nature of these obligations are not addressed in this order, but rather are the subject of the accompanying *Further Notice of Proposed Rulemaking*. *See* discussion *infra* Part IX.

[5] Section 222(f)(1) defines CPNI as: "(A) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier; except that such term does not include subscriber list information." 47 U.S.C. § 222(f)(1). *See infra* generally Part IV, for discussion of carriers' use of CPNI for marketing purposes.

information is expressly defined as "collective data that relates to a group or category of services or customers, *from which individual customer identities and characteristics have been removed.*"[6] Subscriber list information, although consisting of individually identifiable information, is defined in terms of *public*, not private, information, including the "*listed* names, numbers, addresses, or classifications . . . that the carrier or an affiliate has *published, caused to be published, or accepted for publication* in any directory format."[7]

3. In contrast to other provisions of the 1996 Act that seek primarily to "[open] all telecommunications markets to competition,"[8] and mandate competitive access to facilities and services, the CPNI regulations in section 222 are largely consumer protection provisions that establish restrictions on carrier use and disclosure of personal customer information. With section 222, Congress expressly directs a balance of "both competitive and consumer privacy interests with respect to CPNI."[9] Congress' new balance, and privacy concern, are evidenced by the comprehensive statutory design, which expressly recognizes the duty of *all* carriers to

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6 47 U.S.C. § 222(f)(2)(emphasis added). *See infra* generally Part VI, for discussion of carriers' use of aggregate information for marketing purposes, including, for example, in developing new service offerings for its existing customers as well as for creating customer profiles that can be useful in targeting new customers.

7 47 U.S.C. § 222(f)(3)(emphasis added). Subscriber list information is critically important to the development of specialized and competitive directory publications.

8 Joint Explanatory Statement at 1.

9 *Id.* at 205.

protect customer information,[10] and embodies the principle that customers must be able to control information they view as sensitive and personal from use, disclosure, and access by carriers.[11] Where information is not sensitive,[12] or where the customer so directs,[13] the statute permits the free flow or dissemination of information beyond the existing customer-carrier relationship. Indeed, in the provisions governing use of aggregate customer and subscriber list information, sections 222(c)(3) and 222(e) respectively, where privacy of sensitive information is by definition *not* at stake, Congress expressly *required* carriers to provide such information to third parties on nondiscriminatory terms and conditions.[14] Thus, although privacy and competitive

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[10] 47 U.S.C. § 222(a)(establishes general duty, titled "Privacy of Customer Information").

[11] *See* discussion *infra* Part IV.B.2.b (section 222(c)(1), titled "Confidentiality of Customer Proprietary Network Information," embodies principle of customer control).

[12] *See, e.g.*, section 222(c)(3)(involving aggregate customer information, defined as non-personal information); section 222(e)(involving subscriber list information, defined as published information).

[13] *See* discussion *infra* Part V.B.2. Under section 222(c)(1) carriers can use, disclose or permit access to CPNI upon the "approval" of the customer. 47 U.S.C. § 222(c)(1). Under section 222(c)(2) carriers "shall disclose [CPNI], upon affirmative written request by the customer, to any person designated by the customer." 47 U.S.C. § 222(c)(2).

[14] Section 222(c)(3) provides in pertinent part: "A local exchange carrier may use, disclose or permit access to aggregate customer information other than for purposes described in paragraph (1) *only* if it provides such aggregate information *to other carriers or persons on reasonable and nondiscriminatory terms and conditions upon reasonable request therefor.*" 47 U.S.C. § 222(c)(3)(emphasis

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concerns can be at odds, the balance struck by Congress aligns these interests for the benefit of the consumer. This is so because, where customer information is not sensitive, the customer's interest rests more in choosing service with respect to a variety of competitors, thus necessitating competitive access to the information, than in prohibiting the sharing of information.

4. In this *Second Report and Order*, we promulgate regulations to implement the statutory obligations of section 222. We also review our existing regulatory framework governing CPNI, and resolve CPNI issues raised in other proceedings that have been deferred to this proceeding, including obligations in connection with sections 272 and 274 of the 1996 Act. More specifically, for the reasons discussed herein, we modify our rules and procedures regarding CPNI and implement section 222 as follows:

(a) We permit carriers to use CPNI, without customer approval, to market offerings that are related to, but limited by, the customer's existing service relationship with their carrier.[15]

(b) Before carriers may use CPNI to market service outside the customer's existing service relationship, we

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added). Section 222(e) provides that "notwithstanding subsections (b), (c), and (d), a telecommunications carrier that provides telephone exchange service *shall provide* subscriber list information gathered in its capacity as a provider of such service on a timely and unbundled basis, *under nondiscriminatory and reasonable rates, terms and conditions, to any person upon request* for the purpose of publishing directories in any format." 47 U.S.C. § 222(e)(emphasis added).

15 *See* discussion *infra* Part IV.B.

require that carriers obtain express customer approval.[16] Such express approval may be written, oral, or electronic.[17] In order to ensure that customers are informed of their statutory rights before granting approval, we further require carriers to provide a one-time notification of customers' CPNI rights prior to any solicitation for approval.[18]

(c) We eliminate the *Computer III* CPNI framework, as well as sections 22.903(f) and 64.702(d)(3) of our rules, in light of the comprehensive regulatory scheme Congress established in section 222.[19]

(d) We reconcile section 222 with sections 272 and 274, and interpret the latter two provisions to impose no additional CPNI requirements on the Bell Operating Companies (BOCs).[20]

5. Finally, in a *Further Notice of Proposed Rulemaking* (*Further Notice*) we seek additional comment on three issues involving carrier duties and obligations established under sections 222(a) and (b) of the 1996 Act.[21] In

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16 *See* discussion *infra* Part V.B.

17 *See* discussion *infra* Part V.C.

18 *See* discussion *infra* Parts V.F and V.G.

19 *See* discussion *infra* Part VIII.

20 *See* discussion *infra* Part VII.

21 Section 222(a) states that: "[E]very telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier." 47 U.S.C. § 222(a). Section 222(b) states that: "[A] telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information

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particular, we seek further comment on (a) the customer's right to restrict carrier use of CPNI for all marketing purposes;[22] (b) the appropriate protections for carrier information and additional enforcement mechanisms we may apply;[23] and (c) the foreign storage of, and access to, domestic CPNI.[24]

## II. BACKGROUND

6. In response to various informal requests for guidance from the telecommunications industry regarding the obligation of carriers under new section 222,[25] the

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for its own marketing efforts." 47 U.S.C. § 222(b).

22 *See* discussion *infra* Part IX.A.

23 *See* discussion *infra* Part IX.B.

24 *See* discussion *infra* Part IX.C.

25 *See, e.g.*, Letter from Mary McDermott, United States Telephone Association (USTA) to Regina Keeney, Chief of the Common Carrier Bureau, FCC, on behalf of USTA, the National Rural Telephone Association (NRTA), the National Telephone Cooperative Association (NTCA), and the Organization for the Promotion & Advancement of Small Telecommunications Companies (OPASTCO), dated February 14, 1996 (Association Letter). *See also* Petition of the NYNEX Telephone Companies for a Declaratory Ruling as to the Interpretation of Section 222 of the Communications Act (filed Mar. 5, 1996) (NYNEX Petition); Letter from Lawrence E. Sargeant, Vice President - Federal Regulatory, U S WEST, to Regina M. Keeney, Chief, Common Carrier Bureau, FCC, filed March 27, 1996 (disagreeing with NYNEX's interpretation of CPNI provisions). The NYNEX Petition sought a declaratory ruling with regard to the meaning of the term "telecommunications service" as used in section 222(c)(1). NYNEX specifically argued that intraLATA service should be distinguished from interLATA service for the purpose of applying section 222. U S WEST, in a letter response to the NYNEX petition,

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Commission released a *Notice of Proposed Rulemaking*[26] on May 17, 1996. The *Notice*, among other things, sought comment on: (1) the scope of the phrase "telecommunications service," as it is used in section 222(c)(1), which permits carriers to use, disclose, or permit access to individually identifiable CPNI without obtaining customer approval;[27] (2) the requirements for customer approval;[28] and (3) whether the Commission's existing CPNI requirements should be amended in light of section 222.[29]

7. Prior to the 1996 Act, the Commission had established CPNI requirements applicable to the enhanced services[30] operations of AT&T, the BOCs, and GTE, and

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expressed disagreement with NYNEX's interpretation of the CPNI provisions of the statute and argued that section 222 supported the broad use of CPNI in a carrier's provision of telecommunications services.

26 *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Notice of Proposed Rulemaking, CC Docket No. 96-115, 11 FCC Rcd 12513 (1996) (*Notice*).

27 *Notice* at 12523-26, ¶ ¶ 20-26.

28 *Notice* at 12526-28, ¶ ¶ 27-33.

29 *Notice* at 12529-31, ¶ ¶ 38-42.

30 "Enhanced services" generally include such services as voice mail, electronic mail, electronic store-and forward, fax store-and-forward, data processing, and gateways to on-line databases. Prior to the 1996 Act, enhanced services were defined as services "offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction

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the CPE operations of AT&T and the BOCs, in the *Computer II*,[31] *Computer III*,[32] *GTE ONA*,[33] and *BOC CPE*

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with stored information." 47 C.F.R. § 64.702(a); *see also North American Telecommunications Association Petition for Declaratory Ruling Under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services and Customer Premises Equipment*, 101 FCC 2d 349 (1985), *recon.*, 3 FCC Rcd 4385 (1988).

[31] *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations* (*Computer II*), Docket No. 20828, 77 FCC 2d 384 (1980) (*Final Order*), *recon.*, 84 FCC 2d 50 (1980) (*Reconsideration Order*), *further recon.*, 88 FCC 2d 512 (1981) (*Further Reconsideration Order*), *aff'd sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[32] *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations* (*Computer III*), CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) (*Phase I Order*), *recon.*, 2 FCC Rcd 3035 (1987) (*Phase I Recon. Order*), *further recon.*, 3 FCC Rcd 1135 (1988) (*Phase I Further Recon. Order*), *second further recon.*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Recon. Order*); *Phase I Order* and *Phase I Recon. Order vacated sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (*California I*); CC Docket No. 85-229, Phase II, 2 FCC Rcd 3072 (1987) (*Computer III Phase II Order*), *recon.*, 3 FCC Rcd 1150 (1988) (*Phase II Recon. Order*), *further recon.*, 4 FCC Rcd 5927 (1989) (*Phase II Further Recon. Order*); *Phase II Order vacated, California I*, 905 F.2d 1217 (9th Cir. 1990); *Computer III* Remand Proceeding, CC Docket No. 90-368, 5 FCC Rcd 7719 (1990) (*ONA Remand Order*), *recon.*, 7 FCC Rcd 909 (1992), *pets. for review denied sub nom. California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) (*California II*); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, CC Docket No. 90-623, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*), *BOC Safeguards Order vacated in part and remanded sub nom. California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*California III*), *cert. denied*, 115 S. Ct. 1427 (1995) (referred to collectively as the *Computer III* proceeding); *Computer III Further*

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*Relief*[34] proceedings. The Commission recognized in the *Notice* that it had adopted these CPNI requirements, together with other nonstructural safeguards, to protect independent enhanced services providers and CPE suppliers from discrimination by AT&T, the BOCs, and GTE.[35] The *Notice* stated that the Commission's existing CPNI requirements were intended to prohibit AT&T, the BOCs,

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*Remand Proceedings:Bell Operating Company Provision of Enhanced Services*, CC Docket 95-20, Notice of Proposed Rulemaking, 10 FCC Rcd 8360 (1995) (*Computer III Further Remand Notice*), Further Notice of Proposed Rulemaking, FCC 98-8 (rel. Jan. 29, 1998) (*Computer III Further Remand Further Notice*). *See also Filing and Review of Open Network Architecture Plans,* CC Docket 88-2, Phase I, 4 FCC Rcd 1, 209-10, ¶ ¶ 398-99 (1988) (*BOC ONA Order*); *In the Matter of Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone & Telegraph Co.*, CC Docket No. 85-26, Memorandum Opinion and Order, 102 FCC 2d 655 (1985) *(AT&T Structural Relief Order), recon., Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone & Telegraph Co.*, CC Docket No. 85-26, Memorandum Opinion and Order on Reconsideration, 104 FCC 2d 739, 768 (1986) (*AT&T Structural Relief Reconsideration Order).*

[33] *In the Matter of Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corp.*, CC Docket No. 92-256, Report and Order, 9 FCC Rcd 4922, 4944-45, ¶ 45 (1994) (*GTE Safeguards Order)*; *Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corp.*, CC Docket No. 92-256, Memorandum Opinion and Order, 11 FCC Rcd 1388, 1419-25, ¶ ¶ 73-86 (1995) (*GTE ONA Order*).

[34] *In the Matter of Furnishing of Customer Premises Equipment by Bell Operating Telephone Companies and the Independent Telephone Companies*, CC Docket No. 86-79, Report and Order, 2 FCC Rcd 143 (1987) (*BOC CPE Relief Order*), *recon. on other grounds*, 3 FCC Rcd 22 (1987); *aff'd*, 883 F.2d 104 (D.C. Cir. 1989).

[35] *Notice* at 12516, ¶ 4.

and GTE from using CPNI obtained from their provision of regulated services to gain a competitive advantage in the unregulated CPE and enhanced services markets.[36] The *Notice* further stated that the existing CPNI requirements also were intended to protect legitimate customer expectations of confidentiality regarding individually identifiable information.[37] The Commission concluded in the *Notice* that existing CPNI requirements would remain in effect, pending the outcome of this rulemaking, to the extent that they do not conflict with section 222.[38] On November 13, 1996, the Common Carrier Bureau (Bureau) waived the annual CPNI notification requirement for multi-line business customers that had been imposed on AT&T, the BOCs, and GTE under our pre-existing CPNI framework, pending our action in this proceeding.[39]

8. On August 7, 1996, the Commission released the *First Report and Order* in the CPNI proceeding.[40] In the *First Report and Order*, the Commission affirmed its

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36 *Notice* at 12516, 12530, ¶ ¶ 4, 40.

37 *Notice* at 12516, ¶ 4.

38 *Notice* at 12515-16, 12529, ¶ ¶ 3, 38.

39 *Petition for Exemption from Customer Proprietary Network Information Notification Requirements*, Order, CCB Pol 96-20, DA 96-1878, 12 FCC Rcd 15134. On December 16, 1997, the Policy and Program Planning Division waived this requirement for 1997. *In the Matter of Waiver from Customer Proprietary Network Information Notification Requirements*, CCB Pol 97-13, DA 97-2599 (rel. Dec. 16, 1997).

40 *In the Matter of the Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information; Use of Data Regarding Alarm Monitoring Service Providers*, CC Docket No. 96-115, Report and Order, 11 FCC Rcd 9553 (1996).

tentative conclusion that, even if a carrier has received customer approval to use CPNI pursuant to section 222(c)(1), such approval does not extend to the carrier's use of CPNI involving the occurrence of calls received by alarm monitoring service providers,[41] pursuant to the ban on such use in section 275(d).[42] Noting that section 222 sets forth limitations on the ability of telecommunications carriers, their affiliates, and unaffiliated parties to obtain access to CPNI, the Commission further concluded that it was not necessary to bar completely certain of these entities from accessing CPNI simply because they market alarm monitoring services.[43] The Commission deferred deciding the issue of whether any restrictions on access to CPNI were necessary to effectuate the prohibition contained in section 275(d).[44]

9. On December 24, 1996, the Commission released the *Non-Accounting Safeguards Order*, which adopted rules and policies governing the BOCs' provision of certain services through section 272 affiliates.[45] In that order, the

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41 For example, LEC personnel may not use information regarding the occurrence or content of calls received by alarm monitoring service providers, even with customer approval under section 222(c)(1), for purposes of marketing alarm monitoring services.

42 11 FCC Rcd at 9554, ¶ 3.

43 *Id.* at 9558, ¶ 11.

44 *Id.*

45 *In the Matter of Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (*Non-Accounting Safeguards Order*), *recon. pending*, Order on Reconsideration, 12 FCC Rcd 2297 (1997), Second Report and Order,

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Commission concluded that the nondiscrimination provisions of section 272(c)(1) govern the BOCs' use of CPNI and that the BOCs must comply with the requirements of both sections 222 and 272(c)(1).[46] The Commission deferred to this proceeding, however, all other issues concerning the interplay between those provisions.[47] On February 7, 1997, the Commission released the *Electronic Publishing Order*, which adopted policies and rules governing, among other things, the BOCs' provision of electronic publishing under section 274.[48] In that order, the Commission likewise deferred to this proceeding all CPNI-related issues involved in the BOCs' marketing of electronic publishing services.[49] In light of the Commission's determinations in the *Non-Accounting Safeguards* and *Electronic Publishing* orders, the Bureau issued a *Public Notice* on February 20, 1997, seeking to supplement the record in this proceeding on specific issues relating to the subjects previously noticed and their interplay with sections 272 and 274.[50] Finally, the Commission released the *CMRS*

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12 FCC Rcd 15756 (1997), *aff'd sub nom. Bell Atlantic Telephone Companies, et al. v. FCC, et al.*, No. 97-1432, 1997 WL 783993 (D.C. Cir. 1997).

46 *Id.* at 22010, ¶ 222.

47 *Id.*

48 *In the Matter of Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, CC Docket No. 96-152, Report and Order, 12 FCC Rcd 5361 (1997) (*Electronic Publishing Order*), *recon. pending*.

49 *Id.* at 5432, ¶ 169.

50 *Common Carrier Bureau Seeks Further Comment on Specific Questions in CPNI Rulemaking*, CC Docket No. 96-115, Public Notice, 12 FCC Rcd 3011 (1997) (*Public Notice*).

*Safeguards Order* on October 3, 1997, in which it eliminated section 22.903 of the rules generally, but expressly retained subsection 22.903(f), regarding the BOCs' sharing of CPNI with cellular affiliates, pending the outcome of this proceeding.[51]

10. In this *Second Report and Order*, we address the scope and meaning of section 222, as well as the issues deferred to this proceeding. We will consider subsequently, in a separate order, the meaning and scope of section 222(e) of the 1996 Act, relating to the disclosure of subscriber list information by local exchange carriers.[52] We note that LECs became obligated to disclose subscriber list information to directory publishers on nondiscriminatory rates, terms, and conditions, upon passage of the Act. Accordingly, the LEC's duty exists presently, independent of any implementing rules we might promulgate in the future, and a failure to discharge this duty may well, depending on the circumstances, constitute both a violation of section 222(e) and an unreasonable practice in violation of section 201(b).[53]

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51 *In the Matter of Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, WT Docket No. 96-162, Report and Order, 12 FCC Rcd 15668 (1997) (*CMRS Safeguards Order*).

52 47 U.S.C. § 222(e).

53 47 U.S.C. § 201(b).

## IV. CARRIER'S RIGHT TO USE CPNI WITHOUT CUSTOMER APPROVAL

### A. Overview

21. Section 222(c)(1) and section 222(d) set forth the circumstances under which a carrier may use, disclose, or permit access to CPNI without customer approval. Specifically, section 222(c)(1) provides that a telecommunications carrier that receives or obtains CPNI by virtue of its "provision of *a telecommunications service* shall *only* use, disclose, or permit access to individually identifiable [CPNI] in its provision of (A) *the telecommunications service* from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories."[54] Section 222(d) provides:

> [n]othing in this section prohibits a telecommunications carrier from using, disclosing, or permitting access to [CPNI] obtained from its customers, either directly or indirectly through its agents -- (1) to initiate, render, bill, and collect for telecommunications services; (2) to protect the rights or property of the carrier, or to protect users of those services and other carriers from fraudulent, abusive, or unlawful use of, or subscription to, such services; or (3) to provide any inbound telemarketing, referral, or administrative services to the customer for the duration of the call, if such call was initiated by the customer and the customer

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54 47 U.S.C. § 222(c)(1) (emphasis added).

approves of the use of such information to provide such service.[55]

22. Numerous parties comment on the proper interpretation of section 222(c)(1) because this provision governs, among other things, the scope of a carrier's right to use CPNI for customer retention and marketing purposes, without having to seek some form of customer approval. Most carriers acknowledge that they view CPNI as an important asset of their business, and many state that they hope to use CPNI as an integral part of their future marketing plans.[56] Indeed, as competition grows and the number of firms competing for consumer attention increases, CPNI becomes a powerful resource for identifying potential customers and tailoring marketing strategies to maximize customer response.[57] Accordingly, a broad interpretation of the scope of section 222(c)(1) would afford carriers the opportunity to use, disclose, or permit access to CPNI expansively. A narrow interpretation, conversely, would restrict the use carriers can make of CPNI absent customer approval.

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55 47 U.S.C. § 222(d).

56 *See, e.g.*, PacTel *ex parte* (filed Nov. 22, 1996) at 9; SBC *ex parte* (filed Sept. 27, 1996) at 3; U S WEST *ex parte* (filed Oct. 17, 1996) at 8.

57 NTIA *ex parte* (filed Apr. 14, 1997) at att. at 6 (*Privacy and the NII: Safeguarding Telecommunications-Related Personal Information*) (*NTIA Privacy Report*). The *NTIA Privacy Report* further observes that, as competition squeezes profit margins, carriers have an incentive to sell their CPNI to supplement their revenue. *Id.* at 6-7.

23. We conclude that the general framework established under section 222, considered as a whole, carves a limited exception in section 222(c)(1) for carrier use, disclosure, and permission of access to sensitive customer information. Specifically, sections 222(c)(1)(A) and (B), as well as the narrow exceptions in section 222(d), represent the only instances where customer approval for a carrier to use, disclose, or permit access to personal customer information is not required. We believe that the language of section 222(c)(1)(A) and (B) reflects Congress' judgment that customer approval for carriers to use, disclose, and permit access to CPNI can be *inferred* in the context of an existing customer-carrier relationship. This is so because the customer is aware that its carrier has access to CPNI, and, through subscription to the carrier's service, has implicitly approved the carrier's use of CPNI within that existing relationship.

24. The language also suggests, however, that the carrier's right under section 222(c)(1)(A) and (B) is a limited one, in that the carrier "shall *only*" use, disclose, or permit access to CPNI "in the *provision* of" the telecommunications service from which such CPNI is derived or services necessary to, or used in, such telecommunications service.[58] Indeed, insofar as the customer consent in sections 222(c)(1)(A) and (B) is inferred rather than based on express customer direction, we conclude that Congress intended that implied customer approval be restricted solely to what customers reasonably understand their telecommunications service to include. This customer understanding, in turn, is manifested in the complete service

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[58] 47 U.S.C. § 222(c)(1)(emphasis added).

offering to which the customer subscribes from a carrier. We are persuaded that customers expect that CPNI generated from their entire service will be used by their carrier to market improved service within the parameters of the customer-carrier relationship.[59] Although most customers presently obtain their service from different carriers in terms of traditional categories of offerings -- local, interexchange, and commercial mobile radio services (CMRS) -- with the likely advent of integrated and bundled service packages, the "total service approach" accommodates any future changes in customer subscriptions to integrated service.[60]

25. For the reasons described below, we believe that the total service approach best represents the scope of "the telecommunications service from which the CPNI is derived." Under the total service approach, the customer's implied approval is limited to the parameters of the customer's existing service, and is neither extended to permit CPNI use in marketing all of a carrier's telecommunications services regardless of whether subscribed to by the customer, nor narrowed to permit use only in providing a discrete service feature. In this way, the

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[59] As discussed more fully in the following paragraphs, our judgment concerning what customers expect is supported by our historical understanding of customer preferences as well as the present record. Moreover, we believe that it is in the public interest to implement section 222 and clarify carrier CPNI obligations thereunder at this time. To the extent, however, that we are persuaded in the future that our view no longer manifests such customer expectations, and therefore would not appropriately reflect the scope of section 222(c)(1)(A), we could, and would revisit our conclusions.

[60] *See* discussion *infra* ¶.

total service approach appropriately furthers Congress' intent to balance privacy and competitive concerns, and maximize customer control over carrier use of CPNI.

26. Also, as explained below, with respect to section 222(c)(1)(B), we further conclude that a carrier may use, disclose, or permit access to CPNI without customer approval for the provision of inside wiring installation, maintenance, and repair services because they are "services necessary to, or used in, the provision of such telecommunications service" under section 222(c)(1)(B). In contrast, CPE and information services are not "services necessary to, or used in, the provision of such telecommunications service" within the meaning of section 222(c)(1)(B).

## B. Scope of a Carrier's Right Pursuant to Section 222(c)(1)(A): the "Total Service Approach"

### 1. Background

27. In the *Notice*, the Commission tentatively concluded that section 222(c)(1)(A) should be interpreted as "distinguishing among telecommunications services based on traditional service distinctions," specifically, local, interexchange, and CMRS.[61] Thus, for example, a local exchange carrier could use local service CPNI to market local service offerings, but could not use local service CPNI to target customers to market long distance offerings or CMRS, absent customer approval. The Commission further tentatively concluded that short-haul toll should be treated as a local telecommunications service when provided by a LEC, and as an interexchange telecommunications service when provided by an interexchange carrier (IXC).[62] The Commission sought comment on these and other possible distinctions among telecommunications services, the scope of the term "telecommunications service," and the costs and benefits of any proposed interpretation, including the interpretation's impact on competitive and customer privacy interests.[63] The Commission also sought comment on the impact of changes in telecommunications technology and regulation and on whether and when technological and market developments may require the Commission to revisit the issue of telecommunications service distinctions.[64]

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61 *Notice* at 12524, ¶ 22.

62 *Id.* The Commission noted that, for purposes of the *Notice*, "with respect to the BOCs, the term 'short-haul toll' should be interpreted as 'intraLATA toll,' and the term 'interexchange' should be

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28. Commenters recognize that the language of section 222(c)(1)(A) is not clear, and propose at least five different interpretations. First, several parties urge us to interpret section 222(c)(1)(A) as limited to each discrete offering or feature of service subscribed to by a customer.[65] This proposal, which we refer to as the "discrete offering approach," assumes that customers do not expect or understand, for example, that their local exchange carrier would use local CPNI to market the carrier's call waiting feature to them, absent their approval. Second, a number of parties urge us to adopt our tentative conclusion and define the scope of "the telecommunications service from which such [CPNI] is derived" according to the three traditional service distinctions -- local, interexchange, and CMRS.[66]

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interpreted as 'interLATA.'" *Id.* at 12524, ¶ 22 n.57.

63 *Id.* at 12524-25, ¶ ¶ 22-25.

64 *Id.* at 12525, ¶ 23.

65 Ad Hoc Reply at 3-4; CPSR Reply at 6-7; NTIA Further Reply at 9-14; Texas Commission Comments at 8. *See also* CFA Comments at 4 (supports discrete offering approach, but alternatively suggests that three category approach may also be adequate minimum standard).

66 AICC Comments at 9; AirTouch Comments at 2-4 & n.2; California Commission Comments at 7; California Commission Reply at 5-6; CPI Reply at 7-8 & n.5; CompTel at 6; CompTel Reply at 2-4; Excel Comments at 3; Frontier Comments at 4; LDDS WorldCom Comments at 7-8; LDDS WorldCom Reply at 2-4; MobileMedia Reply at 3; PageNet Comments at 2; Sprint Comments at 2-3; Sprint Reply at 8-9; TRA Comments at 15; TRA Reply at 3-4, 10-11 & n.23; Washington Commission Comments at 4; *see also* Ameritech Comments at 3-4 (supports three category approach if CPNI can be used by any affiliate of the carrier); Arch Comments at 3-4, 6 (supports categories but proposes two CMRS categories -- broadband and

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We refer to this as the "three category approach." Under this approach, for example, a customer's local exchange carrier would be able to use local service CPNI to market a call waiting feature to them, as one of many offerings that make up local service, but would not be able to use CPNI to market long distance or CMRS offerings, absent customer approval.[67]

29. Third, a variation on the three category approach is what we refer to as the "two category approach," where local and interexchange services constitute separate service categories, but CMRS, like short-haul toll, "floats" between them.[68] Under this approach, for example, an IXC would be

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narrowband); CFA Comments at 4-5 (supports the three category approach as an alternative to the discrete offering approach; argues that the three category approach, although too broad, is minimum standard necessary); SBT Comments at 1-2 (argues that Commission should forbear from applying three category interpretation to small businesses). We note that NYNEX and PacTel also deemed the three category approach acceptable in their initial pleadings in this docket, although NYNEX would include short-haul toll only in the local service category. NYNEX Comments at 8-10 & n.3; NYNEX Reply at 4 & n.7 (also supporting single category approach); PacTel Comments at 3-4; PacTel *ex parte* (filed Nov. 22, 1996) at 7; PacTel *ex parte* (filed Jan. 17, 1997) at 13. Since their respective mergers, which occurred after their comments were received in this proceeding, however, Bell Atlantic/NYNEX and SBC/PacTel now support the "single category approach." *See, e.g.*, Ameritech, Bell Atlantic, BellSouth, NYNEX, SBC, U S WEST (BOC Coalition) *ex parte* (filed May 9, 1997) at 14; BOC Coalition *ex parte* (filed Aug. 13, 1997) at 11-12.

67 *See, e.g.*, CPI Reply at 7-8; NYNEX Comments at 11.

68 MCI Comments at 3-5; MCI Reply at 4. In addition, BellSouth, GTE, NTCA/OPASTCO, and U S WEST support this approach as an alternative to their first choice, the single category approach. BellSouth Comments at 11-12; GTE Comments at 11-12;

*footnote continued on nextpage*

able to use CPNI obtained from its provision of long distance service to market CMRS, but would not be able to use long distance CPNI to market local service, without customer approval. Fourth, a number of parties urge us to interpret section 222(c)(1)(A) as referring only to one broad telecommunications service that includes all of a carrier's telecommunications service offerings.[69] This approach, which we refer to as the "single category approach," would permit carriers to use CPNI obtained from their provision of any telecommunications service, including local or long distance service as well as CMRS, to market any other telecommunications service offered by the carrier, regardless of whether the customer subscribes to such service from that carrier.

30. Finally, several proponents of the various approaches further argue that we should permit carriers to share CPNI among all offerings and/or service categories subscribed to by the customer from the same carrier.[70] We

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GTE Reply at 2, 4 & n.4; NTCA/OPASTCO Reply at 3; U S WEST Comments at 5, 12-13.

[69] ACTA Comments at 4-5; ALLTEL Comments at 3-4; Ameritech Comments at 3; AT&T Comments at 2-3, 6-11; AT&T Reply at 2-7, 9-10; Bell Atlantic Comments at 2-7; Bell Atlantic Reply at 4-6, att.; BellSouth Comments at 4, 6-10; BellSouth Reply at 4-6; CBT Comments at 3-5; GTE Comments at 10-11; GTE Reply at 1-4; MFS Comments at 3-4; NTCA/OPASTCO Reply at 1-3; SBC Comments at 5-9; SBC Reply at 6-9; USTA Comments at 2-4; USTA Reply at 3-5; U S WEST Comments at 4-6, 10-12; U S WEST Reply at 5 n.18, 7 n.30. *See also* ICG Comments at 5 (single category approach should apply for CLECs, but not ILECs); NYNEX Reply at 4 (supports single category approach as alternative to three category approach).

[70] *See, e.g.*, ACTA Comments at 4; Ameritech Comments at 12; MCI *ex parte* (filed Aug. 15, 1997) at 13-17; SBC

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refer to this concept as the "total service approach" because it allows carriers to use the customer's entire record, derived from the complete service subscribed to from that carrier, for marketing purposes within the existing service relationship. Although parties supporting this concept advance various alternative schemes, we view it as a separate interpretation of section 222(c)(1)(A) that is defined by the customer's service subscription. Under the total service approach, for example, a carrier whose customer subscribes to service that includes a combination of local and CMRS would be able to use CPNI derived from this entire service to market to that customer all related offerings, but not to market long distance service to that customer, because the customer's service excludes any long distance component. Thus, under the total service approach, the carrier's permitted use of CPNI reflects the level of service subscribed to by the customer from the carrier.

**2. Discussion.**

31. As discussed below, we conclude that the total service approach best protects customer privacy interests, while furthering fair competition, and thereby best comports with the statutory language, history, and structure of section 222.

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Reply at 7 n.22; Sprint Comments at 2-3 (but only for entities without market power); Sprint Reply Comments at 8-10 (same). The Texas Commission and Ad Hoc support a total service approach, although they would permit the sharing of CPNI only between the discrete offerings to which a customer subscribes. Ad Hoc Reply at 5-6; Texas Commission Comments at 8.

## V. "APPROVAL" UNDER SECTION 222(c)(1)V

### A. Overview

86. Under sections 222(c)(1), (c)(2), and (d)(3), a carrier may (or must) use, disclose, or permit access to CPNI upon the customer's approval. In contrast to sections 222(c)(2) and (d)(3) of the Act, in which Congress made clear the form of customer approval,[71] section 222(c)(1) does not specify what kind of approval is required when it permits a carrier upon "approval of the customer" to use, disclose, or permit access to CPNI for purposes beyond the limited exceptions set forth in sections 222(c)(1)(A) and (B).[72] Because the form of approval has bearing on carriers' use of CPNI as a marketing tool, we received considerable comment concerning the proper interpretation of "approval" under section 222(c)(1). In general, parties offer three

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71 Section 222(c)(2) provides that: "[a] telecommunications carrier shall disclose [CPNI], upon affirmative written request by the customer, to any person designated by the customer." 47 U.S.C. § 222(c)(2). Section 222(d)(3) provides, in pertinent part, that: "[n]othing in [section 222] prohibits a telecommunications carrier from using, disclosing, or permitting access to [CPNI] obtained from its customers, either directly or indirectly through its agents . . . to provide any inbound telemarketing, referral, or administrative services to the customer for the duration of the call, if such call was initiated by the customer and the customer approves of the use of such information to provide such service." 47 U.S.C. § 222(d)(3).

72 47 U.S.C. § 222(c)(1). Section 222(c)(1) also permits a carrier to use, disclose, or permit access to CPNI as required by law. 47 U.S.C. § 222(c)(1).

separate views, ranging from a most restrictive interpretation that would require approval to be in writing, to a permissive one, where carriers merely would need to provide customers with a notice of their intent to use CPNI, and a mechanism for customers to "opt-out" from this proposed use (notice and opt-out).[73]

87. We conclude that the term "approval" in section 222(c)(1) is ambiguous because it could permit a variety of interpretations. We resolve that ambiguity by implementing the statute in a manner that will best further consumer privacy interests and competition, as well as the principle of customer control. We conclude that carriers must obtain express written, oral, or electronic approval for CPNI uses beyond those set forth in sections 222(c)(1)(A) and (B). Further, in order to ensure that customers can provide informed approval under section 222(c)(1), we require that carriers give customers explicit notice of their CPNI rights prior to any solicitation for approval. By implementing the approval requirements of section 222(c)(1) in this manner, we will minimize any unwanted or unknowing disclosure of CPNI by customers, consistent with Congress' concern for consumer privacy interests. In addition, as explained below, we determine that this form of approval will minimize the competitive advantages that might otherwise accrue unnecessarily to incumbent carriers.

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[73] A notice and opt-out mechanism also is referred to as a "negative option." We refer to oral, electronic, and written forms of approval collectively as "affirmative" or "express" approval.

## B. Express Versus Notice and Opt-Out

### 1. Background

88. The Commission sought comment in the *Notice* on which methods carriers may use to obtain customer approval consistent with section 222.[74] The Commission recognized that, in the *Computer III* proceedings, prior to the 1996 Act, it established certain authorization requirements applicable solely to the enhanced services operations of AT&T, the BOCs, and GTE, and to the CPE operations of AT&T and the BOCs.[75] Under these *Computer III* rules, for example, the BOCs, AT&T, and GTE are required to provide multi-line business customers with written notification of their right to restrict CPNI use.[76] Absent customer direction to the contrary, we permit these carriers to use their respective CPNI for marketing purposes as proposed in their notice. This notice and opt-out approach does not extend, however, to business customers with twenty or more access lines. For these large business customers, we require the BOCs and GTE to obtain affirmative written authorization before using CPNI to market enhanced services.[77] The Commission

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74 *Notice* at 12526, ¶ 27.

75 *Id.* at 12516, ¶ ¶ 4-5; *Computer III supra* note. We discuss the *Computer III* rules specifically, and eliminate them in favor of the framework established by Congress in section 222, *see* discussion *infra* Part VIII.

76 Customers with two or more access lines are multi-line customers. *Computer III Phase II Order*, 2 FCC Rcd at 3093-97 ¶ ¶ 141-174, *supra* note; *GTE Safeguards Order*, 9 FCC Rcd at 4944-45 ¶ 45, *supra* note.

77 *BOC Safeguards Order*, 6 FCC Rcd at 7605-14 ¶¶ 76-

*footnote continued on nextpage*

invited comment in the *Notice* on whether these *Computer III* requirements should remain in view of section 222.[78]

89. The Commission also sought comment in the *Notice* on a number of alternative methods by which carriers may obtain customer approval under section 222(c)(1). The Commission noted, for example, that carriers may choose a written method, in the form of a letter or billing insert sent to the customer that contains a summary of the customer's CPNI rights and is accompanied by a postcard that the customer could sign and return to the carrier to authorize CPNI use.[79] The Commission sought comment on the privacy and competitive implications, as well as the costs and benefits, of requiring carriers to obtain prior written approval before they could use, disclose, or permit access to customer CPNI.[80]

90. Alternatively, the Commission sought comment on whether section 222(c)(1) allows carriers to engage in outbound telemarketing to obtain oral customer approval for CPNI use.[81] The Commission observed that sections 222(c)(2) and (d)(3) give rise to conflicting inferences as to whether approval can be oral.[82] The Commission noted, for example, that section 222(c)(2)

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89, *supra* note; *GTE Safeguards Order*, 9 FCC Rcd at 4944-45 ¶ 45, *supra* note.

78 *Notice* at 12530, ¶ 41.

79 *Id.* at 12527, ¶ 29.

80 *Id.* at 12527, ¶ 31.

81 *Id.* at 12527, ¶ 30.

82 *Id.*

requires telecommunications carriers to disclose CPNI "upon affirmative written request by the customer, to any person designated by the customer," and that the absence of a similar written requirement in section 222(c)(1) suggests that oral approval is permitted under that provision.[83] On the other hand, section 222(d)(3) provides that telecommunications carriers may use, disclose, or permit access to CPNI "to provide any inbound telemarketing, referral, or administrative services to the customer for the duration of the call, if such call was initiated by the customer and the customer approves of the use of such information to provide such service."[84] The Commission stated that section 222(d)(3) could be interpreted to suggest that oral consent was not permissible for a broader purpose or a longer duration, or, in the alternative, to allow a carrier to use CPNI to provide a customer with information for the duration of an inbound call, even if the customer has otherwise restricted the carrier's use of CPNI.[85] The Commission sought comment on how section 222(c)(1) should be interpreted in light of these other provisions.[86]

**2. Discussion**

91. As noted above, while section 222(c)(1) requires customer approval for carrier use of CPNI outside the scope of sections 222(c)(1)(A) and (B), it does not expressly state the form of this approval. In order to implement this provision, we therefore must determine what method of

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83 *Id.*

84 *Id.* at 12527, ¶ 31.

85 *Id.*

86 *Id.*

approval will best further both privacy and competitive interests, while preserving the customer's ability to control dissemination of sensitive information. We conclude, contrary to the position of a number of parties,[87] that an express approval mechanism is the best means to implement this provision because it will minimize any unwanted or unknowing disclosure of CPNI.[88] In addition, such a mechanism will limit the potential for untoward competitive advantages by incumbent carriers. Our conclusion is guided by the natural, common sense understanding of the term "approval," which we believe generally connotes an informed and deliberate response.[89] An express approval

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[87] ALLTEL Comments at 5-6; Ameritech Comments at 9; AT&T Comments at 3; Bell Atlantic Comments at 7; BellSouth Comments at 18; CBT Comments at 8; GTE Comments at 3, 6; NYNEX Comments at 15; PacTel Comments at 5; SBC Comments at 10; USTA Comments at 5; U S WEST Comments at 17-19.

[88] Arch Reply at 4-5; California Commission Reply at 6-7; CompTel Reply at 4-6; CPSR Reply at 10-11; Frontier Comments at 7-8; ITAA Reply at 4, 9-12; LDDS WorldCom Reply at 8; MCI Reply at 8; Sprint Reply at 4-5; TRA Reply at 6, 8, 11-12; Washington Commission Comments at 6-7.

[89] Indeed, a canvass of definitions of "approve" from a variety of sources confirms that the root of the term is "to prove," which connotes an active, affirmative meaning. *See, e.g.*, Webster's New International Dictionary of the English Language 133 (2nd ed. 1934)(1. To demonstrate the truth or correctness of; to establish as the fact or as being sound; to corroborate; to authenticate; 2. To afford proof of, as by active demonstration); Webster's Third New International Dictionary of the English Language Unabridged 106 (1971) (1. To demonstrate the truth or correctness of; establish as fact or as being sound; 2. test, try; 3. to make or show to be worthy of approbation or acceptance; to offer proof of by active demonstration: manifest or display actually or practically; exhibit; 5. to express often formally agreement with and support of or commendation of as meeting a standard); The American

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best ensures such a knowing response. In contrast, under an opt-out approach, as even its proponents admit,[90] because customers may not read their CPNI notices, there is no assurance that any implied consent would be truly informed.[91] We agree with the observations of MCI and Sprint that, insofar as customers may not actually consider CPNI notices under a notice and opt-out approach, they may be unaware of the privacy protections afforded by section 222, and may not understand that they must take affirmative steps to restrict access to sensitive information.[92] We therefore find it difficult to construe a customer's failure to respond to a notice as constituting an informed approval of its contents. Accordingly, we adopt a mechanism of express approval because we find that it is the best means at this time to achieve the goal of ensuring informed customer approval.

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99. Our express approval requirement also is justified by the principles of customer control and convenience that are embodied in section 222.[93] These principles contemplate

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Heritage Dictionary of the English Language (1976) (1. regard favorably; commend by word or action; consider right or good; 2. To confirm or consent to officially; to sanction; ratify).

90 *See, e.g.*, Bell Atlantic Reply at 7; GTE Comments at 5-6, 9.

91 Frontier Comments at 7-8; ITAA Reply at 11-12; MCI Reply at 8; Sprint Reply at 5; *see also* California Commission Comments at 8 (notice and opt-out raises concerns regarding the verification and accuracy of CPNI notices).

92 MCI Reply at 8; Sprint Reply at 5.

93 *See supra* ¶¶ .

that the customer, not the carrier, will decide whether and to what extent CPNI is used. Consistent with these principles, we find that express approval, in contrast to a notice and opt-out approach, best ensures that customers maintain control over carrier use of sensitive CPNI, and that those that wish to limit the use and dissemination of their information will know how, and be able to do so.[94] A market trial conducted by U S WEST supports the view that, when asked, customers more often than not want to limit their carrier's use of their CPNI for purposes beyond the existing service relationship. In its trial, U S WEST attempted to obtain affirmative approval through various means, including inbound and outbound telephone solicitations, as well as through direct mail. In seeking approval from its local service customers, U S WEST generally explained that:

> We're calling all of our customers to ask for their permission to continue to share information about their telephone account services within the *expanding* U S WEST family of product areas. This will allow us to keep on working cooperatively with *other* U S WEST product areas -- like wireless, long distance and the Internet -- to customize product packages to match your individual needs.[95]

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[94] *See* CPI Reply at 4 (while some consumers may find it useful to allow information to be made available to carriers that can provide tailored offerings, others express concern about the availability of information concerning their use of telecommunications).

[95] U S WEST *ex parte* (filed Oct. 8, 1997).

The study generally found that, of those customers even willing to listen to U S WEST's request for approval *(e.g.*, in the outbound telephone solicitation, those that did not hang up or were otherwise not reached), the majority of customers contacted did not approve the carrier's use of their CPNI as proposed by U S WEST.[96] This failure to obtain approval from most customers resulted regardless of whether the solicitation for approval was undertaken by telephone or by mail, or accompanied by financial incentives.[97] For example, the outbound telephone solicitation trial produced a weak response, with more residential customers denying rather than granting approval for CPNI use.[98] Similar results were obtained in response to the direct mail campaign, even when financial inducements were provided.[99]

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96 U S WEST *ex parte* (filed Sept. 9, 1997). Only six to eleven percent of residential customers and five to nine percent of small business customers in U S WEST's direct mail trial approved the use of CPNI for marketing purposes. *Id.* Similarly, only about 28 percent of residential customers in U S WEST's outbound telephone solicitation trial consented to CPNI use. *Id.* at 10. U S WEST was able to secure a 72 percent affirmative response rate in its inbound telephone solicitation trial. *Id.* at 9.

97 *Id.*

98 *Id.* at 10. U S WEST contacted 578 residential customers in its outbound telephone solicitation trial. About 28 percent of these customers granted approval for CPNI use; 33 percent denied approval. *Id.* The remainder of customers sampled represented "hang-ups" or "unworkables," or requested to be placed on a "do-not-call" list. *Id.*

99 U S WEST's direct mail trial was conducted via first class mail to 15,200 individuals, separate from any U S WEST billing, and specifically requested an affirmative response. Some respondents were asked to mail back a form, while others were asked to call a toll-

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## XI. ORDERING CLAUSES

257. Accordingly, IT IS ORDERED that pursuant to Sections 1, 4(i), 222 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. § § 151, 154(i), 222 and 303(r), a REPORT AND ORDER and FURTHER NOTICE OF PROPOSED RULEMAKING is hereby ADOPTED.

* * * *

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

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free number. Some mailings offered no incentive to respond, while others offered one dollar or five dollar incentives. According to U S WEST, response rates were low, regardless of the specific notification approach and the response media used. As noted above, positive response rates ranged from six to eleven percent for residential customers and from five to nine percent for small business customers. *Id.* at 11.

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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No. 98-9518

U.S. WEST, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA,

Respondents,

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AIRTOUCH COMMUNICATIONS, INC. (AIRTOUCH); SPRINT CORPORATION; AT&T CORPORATION; SBC COMMUNICATIONS, INC. (SBC); SOUTHWESTERN BELL TELEPHONE COMPANY; PACIFIC BELL; NEVADA BELL; MCI TELECOMMUNICATIONS CORPORATION; COMPETITIVE TELECOMMUNICATIONS ASSOCIATION; COMPETITION POLICY INSTITUTE; BELLSOUTH

CORPORATION; FRONTIER CORPORATION,

Intervenors.

SOFTWARE & INFORMATION INDUSTRY ASSOCIATION; THF ELECTRONIC PRIVACY INFORMATION CENTER; THE AMERICAN CIVIL LIBERTIES UNION; THE CENTER FOR MEDIA EDUCATION; COMPUTER PROFESSIONALS FOR SOCIAL RESPONSIBILITY; CONSUMER ACTION; CONSUMER FEDERATION OF AMERICA; INTERNATIONAL COMMUNICATIONS ASSOCIATIONS; JUNKBUSTERS; MEDIA ACCESS PROJECT; PRIVACY RIGHTS CLEARINGHOUSE; PRIVATE CITIZEN, INC.; U.S. COLO. AND N.M. PUBLIC INTEREST RESEARCH GROUP; UTILITY CONSUMER ACTION NETWORK; AND 22 LAW PROFESSORS AND PRIVACY SCHOLARS,

Amici Curiae.

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ORDER
Filed November 30, 1999

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Before **PORFILIO, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, BRISCOE, LUCERO** and **MURPHY,** Circuit Judges*.

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*Chief Judge Seymour is recused in this matter and did not participate in consideration of the rehearing petitions.

The petitions for rehearing are denied by the panel that rendered the decision.

The suggestions for rehearing en banc were transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. A poll was requested and denied by a majority of the judges. Judges, Brorby, Henry, Briscoe, Lucero, and Murphy voted in favor of en banc review.

Entered for the Court
PATRICK FISHER, Clerk of Court
by:

Deputy Clerk

## U.S. CONSTITUTION
## AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

**SEC. 4 [47 U.S.C. 154] PROVISIONS RELATING TO THE COMMISSION.**

* * *

(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

**SEC. 222. [47 U.S.C. 222] PRIVACY OF CUSTOMER INFORMATION.**

(a) IN GENERAL.—Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier.

(b) CONFIDENTIALITY OF CARRIER INFORMATION.—A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts.

(c) CONFIDENTIALITY OF CUSTOMER PROPRIETARY NETWORK INFORMATION.—

(1) PRIVACY REQUIREMENTS FOR TELECOMMUNICATIONS CARRIERS.—Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.

(2) DISCLOSURE ON REQUEST BY CUSTOMERS.—A telecommunications carrier shall disclose customer proprietary network information, upon affirmative written

request by the customer, to any person designated by the customer.

(3) AGGREGATE CUSTOMER INFORMATION.—A telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service may use, disclose, or permit access to aggregate customer information other than for the purposes described in paragraph (1). A local exchange carrier may use, disclose, or permit access to aggregate customer information other than for purposes described in paragraph (1) only if it provides such aggregate information to other carriers or persons on reasonable and nondiscriminatory terms and conditions upon reasonable request therefor.

(d) EXCEPTIONS.—Nothing in this section prohibits a telecommunications carrier from using, disclosing, or permitting access to customer proprietary network information obtained from its customers, either directly or indirectly through its agents—

(1) to initiate, render, bill, and collect for telecommunications services;

(2) to protect the rights or property of the carrier, or to protect users of those services and other carriers from fraudulent, abusive, or unlawful use of, or subscription to, such services; or

(3) to provide any inbound telemarketing, referral, or administrative services to the customer for the duration of the call, if such call was initiated by the customer and the customer approves of the use of such information to provide such service.

(e) SUBSCRIBER LIST INFORMATION.—Notwithstanding subsections (b), (c), and (d), a

telecommunications carrier that provides telephone exchange service shall provide subscriber list information gathered in its capacity as a provider of such service on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions, to any person upon request for the purpose of publishing directories in any format.

(f) DEFINITIONS.—As used in this section:

(1) CUSTOMER PROPRIETARY NETWORK INFORMATION.—The term "customer proprietary network information" means—

(A) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and

(B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier;

except that such term does not include subscriber list information.

(2) AGGREGATE INFORMATION.—The term "aggregate customer information" means collective data that relates to a group or category of services or customers, from which individual customer identities and characteristics have been removed.

(3) SUBSCRIBER LIST INFORMATION.—The term "subscriber list information" means any information—

(A) identifying the listed names of subscribers of a carrier and such subscribers' telephone numbers, addresses, or primary advertising classifications (as such classifications

are assigned at the time of the establishment of such service), or any combination of such listed names, numbers, addresses, or classifications; and

(B) that the carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format.

**SEC. 631. [47 U.S.C. 551] PROTECTION OF SUBSCRIBER PRIVACY.**

(a)(1) At the time of entering into an agreement to provide any cable service or other service to a subscriber and at least once a year thereafter, a cable operator shall provide notice in the form of a separate, written statement to such subscriber which clearly and conspicuously informs the subscriber of—

(A) the nature of personally identifiable information collected or to be collected with respect to the subscriber and the nature of the use of such information;

(B)) the nature, frequency, and purpose of any disclosure which may be made of such information, including an identification of the types of persons to whom the disclosure may be made;

(C) the period during which such information will be maintained by the cable operator;

(D) the times and place at which the subscriber may have access to such information in accordance with subsection (d); and

(E) the limitations provided by this section with respect to the collection and disclosure of information by a cable operator and the right of the subscriber under subsections (f) and (h) to enforce such limitations.

In the case of subscribers who have entered into such an agreement before the effective date of this section, such notice shall be provided within 180 days of such date and at least once a year thereafter.

(2) For purposes of this section, other than subsection (h)—

(A) the term "personally identifiable information" does not include any record of aggregate data which does not identify particular persons;

(B) the term "other service" includes any wire or radio communications service provided using any of the facilities of a cable operator that are used in the provision of cable service; and

(C) the term "cable operator" includes, in addition to persons within the definition of cable operator in section 602, any person who (i) is owned or controlled by, or under common ownership or control with, a cable operator, and (ii) provides any wire or radio communications service.

(b)(1) Except as provided in paragraph (2), a cable operator shall not use the cable system to collect personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned.

(2) A cable operator may use the cable system to collect such information in order to—

(A) obtain information necessary to render a cable service or other service provided by the cable operator to the subscriber; or

(B) detect unauthorized reception of cable communications.

(c)(1) Except as provided in paragraph (2), a cable operator shall not disclose personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned and shall take such actions as are necessary to prevent unauthorized access to such information by a person other than the subscriber or cable operator.

(2) A cable operator may disclose such information if the disclosure is—

(A) necessary to render, or conduct a legitimate business activity related to, a cable service or other service provided by the cable operator to the subscriber;

(B) subject to subsection (h), made pursuant to a court order authorizing such disclosure, if the subscriber is notified of such order by the person to whom the order is directed; or
(C) a disclosure of the names and addresses of subscribers to any cable service or other service, if—
(i) the cable operator has provided the subscriber the opportunity to prohibit or limit such disclosure, and
(ii) the disclosure does not reveal, directly or indirectly, the—
(I) extent of any viewing or other use by the subscriber of a cable service or other service provided by the cable operator, or
(II) the nature of any transaction made by the subscriber over the cable system of the cable operator.
(d) A cable subscriber shall be provided access to all personally identifiable information regarding that subscriber which is collected and maintained by a cable operator. Such information shall be made available to the subscriber at reasonable times and at a convenient place designated by such cable operator. A cable subscriber shall be provided reasonable opportunity to correct any error in such information.
(e) A cable operator shall destroy personally identifiable information if the information is no longer necessary for the purpose for which it was collected and there are no pending requests or orders for access to such information under subsection (d) or pursuant to a court order.
(f)(1) Any person aggrieved by any act of a cable operator in violation of this section may bring a civil action in a United States district court.
(2) The court may award—

(A) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation of $1,000, whichever is higher;
(B) punitive damages; and
(C) reasonable attorneys' fees and other litigation costs reasonably incurred.
(3) The remedy provided by this section shall be in addition to any other lawful remedy available to a cable subscriber.
(g) Nothing in this title shall be construed to prohibit any State or any franchising authority from enacting or enforcing laws consistent with this section for the protection of subscriber privacy.
(h) A governmental entity may obtain personally identifiable information concerning a cable subscriber pursuant to a court order only if, in the court proceeding relevant to such court order—
(1) such entity offers clear and convincing evidence that the subject of the information is reasonably suspected of engaging in criminal activity and that the information sought would be material evidence in the case; and
(2) the subject of the information is afforded the opportunity to appear and contest such entity's claim.

(2)

No. 99-1427

Supreme Court, U.S.
FILED
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IN THE

# Supreme Court of the United States

COMPETITION POLICY INSTITUTE,

*Petitioner,*

*v.*

U S WEST, INC., ET AL.,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## RULE 29.6 STATEMENT

U S WEST, Inc. is a publicly held corporation which provides products and services to the public through its operating subsidiaries. There is no publicly held company that owns 10% or more of the stock of U S WEST, Inc.

On July 18, 1999, U S WEST, Inc. and Qwest Communications International Inc. entered into an Agreement and Plan of Merger. Upon completion of the merger, the name of the surviving entity will be Qwest Communications International Inc. On August 19, 1999, the Securities and Exchange Commission decided not to review the companies' registration statement filing. On September 7, 1999, the Department of Justice approved the merger. Shareholders of the companies approved the merger on November 2, 1999. On March 10, 2000, the Federal Communications Commission conditionally granted applications filed by U S WEST, Inc. and Qwest Communications International Inc. to transfer control of licenses and lines in connection with the merger.

BellSouth Corporation is a publicly held corporation which provides products and services to the public through its operating subsidiaries. There is no publicly held company that owns 10% or more of the stock of BellSouth Corporation.

SBC Communications Inc. (formerly Southwestern Bell Corporation) is a publicly held corporation with equity and debt in the hands of the general public. The subsidiaries of SBC Communications Inc. are principally engaged in the business of providing communications services and products to the general public. SBC Communications Inc. has no parent corporation. No publicly held company has a 10 percent or greater ownership interest in SBC Communications Inc.

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents U S WEST, Inc., BellSouth Corporation, and SBC Communications, Inc. respectfully submit this brief in opposition to the petition for certiorari filed by the Competition Policy Institute (CPI).

In this case, the U.S. Court of Appeals for the Tenth Circuit vacated a Federal Communications Commission (FCC) Order and accompanying regulations, and remanded the matter to the FCC for further proceedings.

In reaching its decision, the Tenth Circuit applied settled First Amendment principles. The Court of Appeals faithfully followed governing precedent and did not create any circuit split. This case involves no novel legal issue or unresolved question of law. Instead, the Tenth Circuit's decision is fact-specific and highly dependent on the particular administrative record assembled before the FCC. Certiorari is unwarranted because the decision below is demonstrably correct and because this Court's review would be limited to the case-specific application of settled law to the facts of this record.

Moreover, the Government has decided *not* to file a petition for certiorari with respect to the Tenth Circuit's decision. In fact, since issuing the initial Order reviewed by the Tenth Circuit, the FCC has subsequently released an Order on Reconsideration reexamining several aspects of the original Order. The Tenth Circuit did not invalidate the statute which the FCC's rules purported to implement, nor did the Court of Appeals preclude the FCC from commencing a rulemaking to promulgate new regulations. The matter has been remanded to the FCC and should be left to the Commission's consideration.

CPI, a purely private party which was an intervenor in support of the FCC below, has sought this Court's review. However, the Government's decision not to seek certiorari means that CPI's petition should be denied. The FCC, not CPI, is the governmental agency charged by Congress with the responsibility for promulgating and enforcing the rules in question. The FCC's determination not to seek certiorari from

the Tenth Circuit's decision vacating its rules should thus be accorded great, and indeed decisive, weight.

CPI's claim that the Tenth Circuit's judgment sets a precedent for "personal privacy in today's 'information age'" that "will have far-reaching consequences" (Pet. 2) is hyperbole. Even if that statement were accurate, which it is not, the supposed novelty and complexity of the issues would militate strongly *against* review here, particularly because the Government has not filed a petition for certiorari; the FCC has issued an Order on Reconsideration; and no lower court except the Tenth Circuit has addressed the matter.

CPI's petition should be denied.

## STATEMENT OF THE CASE

This case involves rules adopted by the FCC to restrict the First Amendment right of telephone carriers to speak to their customers using telephone company business records unless the carriers first obtain the customers' prior affirmative consent. The rules also restrict the concomitant right of customers to receive targeted communications from telephone carriers.

The FCC attempted to prevent carriers from identifying which of their customers, based on their past purchasing habits, were most likely to be interested in subscribing to new services like cellular and long distance, and to prevent the telephone companies from marketing to their own subscribers on that basis. Thus, the FCC's regulations prevented telephone carriers from engaging in targeted communications and forced them to market, if at all, through blanket, undifferentiated solicitations directed at all their customers in a blunderbuss fashion.

The business information at issue is known as "customer proprietary network information" (CPNI). CPNI is commercial information that a telephone carrier accumulates in the course of doing business with individual members of the public. CPNI includes information about what services customers purchase and how they make use of those services, such as number of

telephone lines, service location, type and class of service, and usage levels (including the numbers called).[1] CPNI is comparable to the information that credit card companies, grocery stores, mail-order catalogs, banks, Internet service providers, and many other firms accumulate about their customers' purchasing and usage characteristics, as part of their routine business operations. Without CPNI, telephone companies could not run their businesses at all.

In particular, without using CPNI, telephone companies could not tailor their communications to customers about services to meet the customers' telecommunications needs. If communications occurred at all, they would take the form of mass outbound telemarketing or direct mail solicitations going to many customers who have little use for or interest in the particular services being offered. CPNI is thus essential in enabling a carrier to communicate with its customers effectively and to avoid undue intrusions (unwelcome dinner-time phone solicitations, for example) on those individuals least likely to be interested in those communications.

The FCC's rules purported to implement Section 222 of the Telecommunications Act of 1996, which restricts the ability of telecommunications carriers to "use, disclose, or permit access to" CPNI, except "with the approval of the customer." 47 U.S.C. § 222(c)(1) (West Supp. 1999). The FCC interpreted the term "approval" in Section 222 as requiring carriers to obtain prior affirmative customer consent before using CPNI to speak, rather

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[1] The relevant federal statute defines CPNI as "(A) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the customer-carrier relationship; and (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier; except that such term does not include subscriber list information." 47 U.S.C. § 222(f)(1).

than allowing carriers simply to give their customers the opportunity to veto such use of the CPNI. In choosing "opt-in" over "opt-out," the CPNI rules departed markedly from well-settled regulatory policy, were at odds with overwhelming evidence regarding customers' expectations of their relationships with their existing carriers, and were in no way compelled by the statutory language or legislative history of Section 222.

1. ***Regulatory Background.***

Prior to Congress' enactment of Section 222, the FCC had given extensive consideration to the CPNI issue, although it had adopted rules only with regard to certain carriers and certain types of services. In particular, the FCC had repeatedly rejected prior affirmative consent requirements. The FCC's rules generally permitted carriers to use CPNI to market new and innovative services without any expression of customer approval beyond that implied in a carrier-customer relationship. In general, the FCC's rules were designed around limited customer notifications and opt-out rights.

The FCC's CPNI safeguards were limited to certain offerings by AT&T, the Bell Operating Companies (BOCs), and GTE. *See Implementation of the Telecommunications Act of 1996*, Second Report and Order, 13 FCC Rcd 8061, at ¶¶ 174-79 (1998) (*CPNI Order*).[2] Other carriers were free to use CPNI in any way they wished. Similarly, AT&T, the BOCs, and GTE could freely use CPNI with respect to services other than those addressed by the

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[2] For example, the BOCs, AT&T and GTE were required to send annual notices of CPNI rights regarding enhanced services such as voicemail or data processing to all of their multi-line (2 or more lines) business customers. The BOCs and GTE (but not AT&T) were required to obtain prior written authorization from business customers with 20 or more access lines before using CPNI to market enhanced services (but not customer premises equipment, such as telephone sets). *See CPNI Order* at ¶ 176. The evidence showed that, given the large size and close carrier relationship with such customers, the rule was not a burden on carriers in practice, and it was never challenged in court. *Computer III Remand Order*, 6 FCC Rcd 7571, 7611 ¶ 86 (1991).

Commission.

Further, the FCC's predecessor CPNI rules were crafted to minimize restrictions on the use of this valuable commercial information. Such restrictions, the FCC recognized, would have hindered one-stop shopping and joint marketing and defeated the important federal goals of carrier efficiencies and customer convenience. The FCC concluded that, "[u]nder a prior authorization rule, a large majority of mass market customers are likely to have their CPNI restricted through inaction .... Thus, a prior authorization rule would vitiate a BOC's ability to achieve efficiencies through integrated marketing to smaller customers." *Computer III Remand Order*, 6 FCC Rcd. 7571, 7610 n.155 (1991). Accordingly, the FCC preempted state CPNI rules that might require prior authorization, "determining that such state rules would effectively negate federal policies promoting both carrier efficiency and consumer benefits." *NPRM*, 11 FCC Rcd 12513, 12522 ¶ 16 (1996). The Ninth Circuit upheld this preemption determination, opining that, "[i]f small customers are required to take an affirmative step of authorizing access to their information, they are unlikely to exercise this option [which will] impair the development of the mass market for enhanced services in the small customer market." *California v. FCC*, 39 F.3d 919, 921 (9th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995). *See Southwestern Bell Tel. Co. v. Public Util. Comm'n of Texas*, 812 F. Supp. 706, 709 (W.D. Tex. 1993) (upholding FCC's conclusion that "prior authorization rules would require separation of basic and enhanced marketing personnel, defeating the goal of integration of all marketing forces.").

Subsequently, when AT&T acquired McCaw's cellular operations in 1995, the FCC refused to bar AT&T from sharing its long-distance CPNI with its new cellular affiliate, finding that neither customer privacy nor competitive equity warranted such a prohibition. The FCC cited "consumer choice and efficiency" as the basis for its ruling, reasoning that any customers with contrary desires could readily opt out. *In re Applications of*

*McCaw & AT&T Co.*, 10 FCC Rcd 11786, 11794 (1995). The FCC vigorously defended this view on appeal,[3] and the D.C. Circuit upheld its determination that allowing AT&T/McCaw to use AT&T's long-distance CPNI to solicit the cellular customers of competing providers would "lead to lower prices and improved service offerings." *SBC Communications, Inc. v. FCC*, 56 F.3d 1484, 1495 (D.C. Cir. 1995).

In short, the FCC concluded time and again that a prior affirmative consent requirement to use CPNI was unnecessary to protect competition,[4] unnecessary to protect customer privacy,[5] and at odds with efficient carrier operations, joint marketing, and customers' desire for one-stop shopping.[6]

**2. *The 1996 Telecommunications Act.***

Against the background of the lengthy CPNI regulatory history, Congress adopted Section 222 in the 1996 Telecommunications Act. That Section applies to all telecommunications services and to all carriers, rather than merely to some services and to only AT&T, the BOCs, and GTE, as had been the FCC's previous approach. Congress made no finding that the FCC's prior approach to CPNI had been inadequate or contrary to the public interest. Without

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[3] The FCC explained that "courts have consistently recognized that capitalizing on informational efficiencies . . . is not the sort of conduct that harms competition," and that it "is manifestly pro-competitive and beneficial to consumers to allow a multi-product firm . . . maximum freedom in offering its competitive services to all of its customers" by utilizing CPNI. Brief for Appellee FCC in *Southwestern Bell Corp. v. FCC*, Nos. 94-1637, 94-1639, at 49 (D.C. Cir. filed Feb. 13, 1995).

[4] *See Phase II Order*, 2 FCC Rcd 3072, 3094 (1987); *Phase II Further Reconsideration Order*, 4 FCC Rcd 5927, 5929 (1989), *vacated on other grounds*, 905 F.2d 1217 (9th Cir. 1990).

[5] *Computer III Phase II Reconsideration Order*, 3 FCC Rcd 1159, 1163 ¶ 98 (1988); *Phase II Order*, 2 FCC Rcd 3072, 3094 ¶ 152 (1987).

[6] *See AT&T CPE Relief Order*, 102 FCC 2d 655, 678-79, 692-93 (1985); *BOC CPE Relief Order*, 2 FCC Rcd 143, 147-48, 167 n.86 (1987).

repudiating that approach, Congress struck what it deemed to be the appropriate balance between (i) privacy interests and (ii) competitive efficiencies and carrier rights.

Section 222 provides that telecommunications carriers are free to use CPNI in their "provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service." 47 U.S.C. § 222(c)(1). In order for a telecommunications carrier to use CPNI for broader purposes, the use must be "required by law or with the approval of the customer" or must qualify under one of the exceptions stated in Section 222(d).[7]

There is no indication in Section 222(c)(1) that Congress intended the word "approval" to require before-the-fact, explicit customer consent through an affirmative act. Indeed, Section 222(c)(1) stands in stark contrast to Section 222(c)(2), which requires telecommunications carriers to provide CPNI in their possession to any entity designated by the customer, "upon *affirmative* written request by the customer." (emphasis added). Notably, Section 222(c)(1) contains neither the word "affirmative," nor the term "express."

The clear textual basis for concluding that Congress meant *not* to require "affirmative" customer consent is buttressed by the legislative history. Section 222 emerged from a series of House bills that would have required an "affirmative request" from the customer before a local exchange carrier could use CPNI beyond certain specified purposes. H.R. 3432, 103d Cong, 1st Sess. (1993). The next legislative proposal expanded the scope of the provision to all carriers. H.R. 3626, 103d Sess., 2d Sess. (1994). The bill also removed the term "affirmative" and inserted the word "approval."

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[7] These exceptions include the initiating, rendering and billing of services; fraud prevention; and the provision of inbound telemarketing, referral or administrative services on an inbound call if the customer approves of the use of CPNI during the call.

Section 222 was adopted in the context of sweeping deregulatory measures designed to foster competition in all telecommunications markets. Congress acknowledged that customers want "one-stop shopping" (S. Rep. No. 230, 104th Cong. 2d Sess. 22-23 (1997)) and fostered the integration of telecommunications services by granting telecommunications carriers joint marketing authority with respect to long distance (47 U.S.C. § 272), electronic publishing (47 U.S.C. § 274), and wireless services (47 U.S.C. § 601). As the FCC itself has acknowledged, these activities require carrier use of CPNI. *See, e.g., Universal Card Order*, 8 FCC Rcd 8782, 8787 ¶ 27 (1993).

Hence, a proper interpretation of Section 222 would recognize that Congress did not intend to impose a prior affirmative consent requirement. Indeed, such a requirement would frustrate the statutory scheme and joint marketing opportunities created by Congress.

***3. The FCC's Notice of Proposed Rulemaking.***

The FCC soon sought to revise the congressional balance. As a self-effectuating statutory provision,[8] Section 222 required no independent FCC rulemaking. However, in February 1996, several local telephone company associations advised the FCC that their members — who, unlike the BOCs, AT&T, and GTE, had never been subject to CPNI rules — were unclear about their obligations under Section 222 and requested the Commission to provide "guidance" regarding such obligations. *CPNI Order* at ¶ 6 & n. 15. Subsequently, NYNEX, a BOC, filed a petition for a declaratory ruling regarding the proper interpretation of a single aspect of Section 222 — the scope of the phrase "telecommunications service." Designated Excerpts of Record on Appeal ("R.") Tab 46. The FCC responded by initiating a broad-based rulemaking regarding the meaning of much of the Section. *Notice of Proposed Rulemaking*, 11 FCC Rcd 12513

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[8] *Computer III Remand Proceedings: Rules Governing Telephone Carriers' Use of CPNI*, 11 FCC Rcd 16617, 16619 (1996).

(1996) (*NPRM*).

In the *NPRM*, the FCC read Section 222 as revolutionizing the CPNI rules for telecommunications carriers. Despite the long-standing absence of a prior authorization requirement with respect to the use of CPNI, the FCC in the *NPRM* repeatedly referred to "prior" customer "authorization" as potentially being mandated by Section 222(c)(1), *see NPRM* at ¶¶ 20, 21, 23, 26, even though the words "prior" or "authorization" never appear in that subsection.

The Commission also set out its tentative conclusions regarding the meaning of the term "telecommunications service" as used in Section 222. It concluded that the term should be construed to reflect three separate "traditional service distinctions": local exchange (including local long-distance or short-haul toll), interexchange (also including short-haul toll) and Commercial Mobile Radio Service (CMRS or wireless). The significance of the categories was that, barring some type of customer "approval," carriers would be limited in their ability to use CPNI across service categories to communicate with customers.

**4. *The Administrative Record.***

The *NPRM* raised the spectre of a serious disruption in the carrier-customer relationship. An extensive administrative record was created as a host of commenters urged the Commission to reconsider its tentative views with respect to both the appropriate scope of the term "telecommunications service" and the construction of the word "approval." R. Tabs 2-10, 13, 15-31, 33, 34, 36-39, 42, 43. The administrative record is significant because it eliminates any justification for the FCC's CPNI rules.

U S WEST and other parties urged the Commission to adopt a construction of the word "approval" that was consonant with reasonable customer expectations and commercial practices. The commenters noted that "approval" could be construed in a variety of ways, ranging from tacit or implied approval stemming from an existing business relationship, to a notice and opt-out

approval scheme, to oral or written express consents in the context of disclosure of information to unaffiliated third parties. R. Tabs 28, 36.

U S WEST acknowledged that the FCC might decide that the use of a notice and opt-out approval mechanism was not sufficient with respect to the disclosure of CPNI to unaffiliated third parties having no relationship with the customer's carrier. However, U S WEST and others urged the FCC to differentiate between third-party disclosures and internal use of CPNI. U S WEST maintained that the undisputed record evidence showed that customers expected CPNI to be shared within the corporate family with which they have a business relationship. R. Tab 14, at 10-11; Tab 18, at 4-6; Tab 20; Tab 23, at 2-3; Tab 36, at 15-20.

Pacific Telesis (now a part of SBC Communications, Inc.) provided the Commission with a public opinion survey on the use of CPNI by local telephone companies conducted under the leadership of Dr. Alan Westin, Professor of Public Law and Government at Columbia University and one of the world's leading authorities on information policy and privacy. R. Tab 20. The study concluded that:

• The public has a great deal of confidence in telephone companies (particularly local companies) and trusts them to protect the confidentiality of the personal information they collect about customers and to use it in a responsible way.

• Despite a generalized concern over privacy issues, large majorities of the public believe it is acceptable for businesses, and in particular local telephone companies, to communicate with their own customers to offer them additional services, especially if those not wishing to receive such communications are provided with an opt-out opportunity.

• In particular, a large public majority believes that it is acceptable for local telephone companies to communicate with their own customers using CPNI data. The availability of an opt-out procedure brings initial approvals of local telephone company use of CPNI from the two-out-of-three respondent level

up to the 80% range of public approval.

• Individuals understand "notice and opt out" procedures, and many have used them in one context or another.

Bell Atlantic presented survey evidence demonstrating that 85.9% of respondents wanted to deal with a single carrier for all of their telecommunications needs and noted another study documenting customer interest in one-stop shopping. R. Tab 34. Cincinnati Bell Telephone (CBT) submitted a survey showing that the "vast majority of customers surveyed (81.5%) want[ed] to be kept aware of the services" offered by their local carrier and those same customers expected their carrier to use CPNI to tailor the communication. R. Tab 42.

In addition, U S WEST designed a trial to test the feasibility of securing written or oral affirmative customer consents. The trial showed the devastating effect that an affirmative customer consent requirement would have on a carrier's ability to use CPNI internally as well the barrier to communication that such a consent requirement would impose. R. Tab 10. For example, the outbound mail campaign successfully resulted in affirmative consents in only 6-11% of cases. The outbound calling campaign produced consents in the range of 29%, with refusals in about the same amount. Significantly, with respect to the outbound calling portion of the trial, U S WEST was not even able to reach one-third of the customers it attempted to contact for purposes of requesting consent. The offering of incentives appeared to have no material impact on the frequency with which consents were provided. Extrapolating to its service population of over 11 million customers, U S WEST estimated that it would cost in excess of $202 million to $336 million simply to request affirmative CPNI consents from its customer base. And even that immense expenditure would not assure contact with each individual, much less assure that the customer would understand and consider the CPNI affirmative consent request.

Together with this evidence, U S WEST submitted a detailed constitutional analysis by Professor Laurence Tribe (now counsel of record for respondents) concluding that an affirmative consent

requirement presented serious First Amendment questions. R. Tabs 11, 14.

The FCC was also advised of an analysis by the Privacy Working Group of the Clinton Administration's National Information Infrastructure Task Force (NIITF),[9] as well as a prior study by the National Telecommunications and Information Administration (NTIA) of the Department of Commerce.[10] Both organizations concluded that an opt-out method of customer approval was generally appropriate with respect to the commercial use of individually-identifiable information. The NTIA also submitted comments directly to the FCC contending that an opt-out process represented an appropriate means for securing customers' approval, in the context of an existing customer-carrier relationship. R. Tab 16.

The carrier submissions to the FCC also included a copy of a recent Report to Congress by the Federal Trade Commission (FTC) involving certain types of "locator" services. R. Tab 6. That report, which involved information far more sensitive than CPNI, generally endorsed the self-regulatory guidelines promulgated by the industry participants. Those guidelines included only an "opt out" provision with respect to use of personally-identifiable information.

Further, the comments noted that the FCC's proposed approach was inconsistent with other federal statutes regulating customer "privacy." Other laws generally grant notice and opt-out rights only, rather than imposing the kinds of draconian rules promulgated by the FCC. For example, cable operators are allowed to use subscriber information for their own business

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[9] *See* "Privacy and the National Information Infrastructure: Principles for Providing and Using Personal Information, A Report of the Privacy Working Group" (Oct. 1995).

[10] *See* U.S. Department of Commerce, NTIA, "Privacy and the NII: Safeguarding Telecommunications-Related Personal Information" (Oct. 1995).

purposes and are required to obtain affirmative approval only to share that information with unaffiliated third persons. 47 U.S.C. § 551(c)(1). The Fair Debt Collection Practices Act of 1977 permits debt collectors to disclose a debtor's financial situation to credit reporting agencies. 15 U.S.C. § 1692c(b). The 1996 Consumer Credit Reporting Reform Act allows credit reporting agencies to furnish consumer credit information for marketing credit or insurance opportunities to consumers, so long as the agency establishes a toll-free number so that consumers can call and opt out by having their names removed from lists for direct marketing purposes. 15 U.S.C. § 1681b(c)(5). The Uniform Health Care Information Act, adopted by the National Conference of Commissioners on Uniform State Laws, *see* 9 U.L.A. 475 (1988 & Supp. 1992), created an opt-out scheme for certain disclosures of medical information. *Id.* at §§ 2-103, 2-104.

**5. *The FCC's Order***

The FCC overrode this assembled administrative record. The *CPNI Order* is a 261-paragraph order purporting to implement a six-paragraph self-effectuating statutory provision. That the FCC managed to derive so lengthy and detailed an order from a deregulatory statute demonstrates how far the Commission strayed from Congress' intent. The FCC rejected the expert views of other agencies; rejected authoritative evidence demonstrating the adequacy of a notice-and-opt-out approval model; and rejected the constitutional analyses submitted by U S WEST.

Instead, the FCC adopted a series of rules forbidding carriers to speak to customers using CPNI without prior affirmative consent. Under the FCC's so-called "total service approach," a multiproduct carrier providing local service to a particular customer would not be able to use CPNI, without prior customer consent, to speak to that customer regarding cellular or long-distance service. A carrier could offer a customer voicemail service to which calls might be routed if the wireline telephone were not answered but could not – without the customer's prior

affirmative consent – use customer information to offer a wireless service to which the same calls might be directed instead.

The result of the *CPNI Order* is that carriers having a relationship with customers may not use CPNI associated with a customer's purchasing behaviors or service use to determine whether the customer would likely be interested in information about another service offering, *unless* the carrier has had a *prior* communication with the customer and has secured an express authorization to use the information in that manner. In short, the FCC forbade telecommunications carriers from speaking with the assistance of CPNI unless they were able to secure prior affirmative consent from each of their millions of individual customers — who are themselves often served by more than one carrier.

**6. *The Court of Appeals' Decision.***

The Tenth Circuit properly vacated the FCC's CPNI rules. The court held that the FCC's regulations presented substantial free speech questions because they amounted to "a restriction on speech tailored to a particular audience." Pet. App. 12a. The Court of Appeals therefore held that the rules were not entitled to deference under the doctrine of *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

The Court of Appeals applied the familiar four-part test for regulations of commercial speech set out in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562-63 (1980). The court found that "[t]he government presents no evidence showing the harm to either privacy or competition is real. Instead, the government relies on speculation" of the kind this Court has repeatedly held to be inadequate in the context of intermediate First Amendment scrutiny. Pet. App. 26a. The court also held that the FCC's rules were not narrowly tailored to protecting either privacy or competition because a notice and opt-out alternative was an obvious and less restrictive way of achieving the government's objectives. The court concluded

that, "based on the record before us, the agency has failed to satisfy its burden of showing that the customer approval regulations restrict no more speech than necessary to serve the asserted state interests." *Id.* at 32a. The court did not prescribe the promulgation of any particular regulations but left to the administrative process the question of whether a further rulemaking was necessary.

## REASONS FOR DENYING THE WRIT

### I. CERTIORARI SHOULD BE DENIED IN LIGHT OF THE GOVERNMENT'S DECISION NOT TO SEEK THIS COURT'S REVIEW.

CPI trumpets the "separation of powers," the importance of "agency responsibility," and the need for "regulatory discretion." Pet. 20, 22. CPI contends that no party must be permitted to "encroac[h] upon the power of the executive branch to adopt regulatory policy within its statutory authority." Pet. 22.

But those principles strongly militate *against* certiorari in this case. Here, the FCC has exercised its "regulatory discretion" by *not* seeking this Court's review. The only petition for certiorari pending before this Court has been filed by CPI, not by the Government. The Government, represented by counsel intimately familiar with this Court's criteria for granting certiorari, has determined that further review is not warranted at this time. Where appropriate, the Solicitor General has shown no hesitation in petitioning for certiorari from decisions invalidating federal statutes or regulations on First Amendment grounds. *E.g.*, *United States v. Players Int'l*, No. 98-721; *United States v. Chesapeake & Potomac Tel. Co.*, Nos. 94-1893, 94-1900; *Rubin v. Coors Brewing Co.*, No. 93-1631. CPI's effort to second-guess the FCC's determination that this case does not merit certiorari is exceedingly anomalous. A private party's petition for certiorari should ordinarily be denied when the very agency that promulgated the rules in question has deliberately

decided *not* to seek this Court's review.

"Vindicating the *public* interest . . . is the function of Congress and the Chief Executive." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992) (emphasis in original). To grant review where the Government has not filed a petition for certiorari would come perilously close to "transfer[ring] from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed." *Id.* at 577.

Accordingly, this Court has held that a private party like CPI lacks standing to pursue an appeal where the government official charged with defending a law has decided not to seek further judicial review. *See Diamond v. Charles*, 476 U.S. 54, 64-65 (1986) (private party lacks the ability to appeal the invalidation of a state statute where the state itself has not sought an appeal); *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another").

These separation of powers and Article III principles have particular salience in the First Amendment and administrative law contexts. The CPNI rules must be judged solely according to the justifications put forward by the FCC in its *Order*, not according to the *post hoc* rationalizatons of counsel (let alone private counsel) before this Court. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *see also Edenfield v. Fane*, 507 U.S. 761, 768 (1993).

There are also practical reasons to deny certiorari where the Government has not filed its own petition. CPI acknowledges that it is financed primarily by "new entrants in the market for local telephone service." Pet. ii. In this case, it will represent the economic interest of its sponsors rather than any broader public interest. In the absence of a petition by the Government, the issues raised by CPI would undoubtedly be colored by, if not completely subordinated to, its own private interest. *See* Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, SUPREME COURT PRACTICE § 4.11, at 184-85 (7th ed.

1993) ("an issue the Court deems of interest and importance only to the immediate parties to the case is not likely to qualify as worthy of further consideration").

For all these reasons, certiorari is inappropriate in light of the Government's decision not to seek this Court's review.

## II. CERTIORARI SHOULD BE DENIED BECAUSE THE MATTER IS ON REMAND AND SHOULD BE LEFT TO THE FCC'S CONSIDERATION.

Certiorari is unwarranted for the further reason that the CPNI rules vacated by the Tenth Circuit are on remand to the FCC. The Court of Appeals did not invalidate Section 222 or hold that the FCC was completely precluded from adopting any rules to implement the provision. Nor did the Tenth Circuit direct the Commission to take any specific course of action or to adopt any specific proposal in place of the CPNI rules. Rather, the Tenth Circuit held only that "[t]he FCC failed to adequately consider the constitutional implications of its CPNI regulations. . . . [W]e do not 'advocate' any specific approach. We merely find fault in the FCC's inadequate consideration of the approval mechanism alternatives in light of the First Amendment." Pet. App. 33a & n.15.

The FCC is best situated to address the deficiencies in the CPNI rules in the first instance. Denial of certiorari will accordingly allow the FCC to exercise what CPI calls the government's "regulatory discretion" on remand. Pet. 22.

Indeed, on September 3, 1999, the FCC released an Order on Reconsideration in the CPNI proceeding, reducing the restrictions on telephone companies' use of CPNI to market services and equipment to their own customers. *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Order on Reconsideration, 14 FCC Rcd 14409 (released Sept. 3, 1999; adopted Aug. 16, 1999). For example, the Order on Reconsideration permitted telephone companies to use CPNI to

market to their customers equipment and information services that are necessary to, or used in, the provision of their telephone service, such as telephones, caller ID units, voicemail, and certain fax services without first obtaining affirmative customer consent. The Reconsideration Order also allowed wireless telephone carriers to use CPNI without prior customer consent to market related information services. In addition, the Reconsideration Order allowed all telephone companies to use CPNI in their efforts to "win back" customers lost to competitors, reasoning that "winback" campaigns are good for competition.

In short, the Reconsideration Order shows that the FCC has already revised its views of Section 222's requirements. Although the legal status of the Reconsideration Order is questionable given the Tenth Circuit's decision vacating the underlying *CPNI Order*, the Reconsideration Order demonstrates that the original *CPNI Order* no longer reflects the FCC's position. The CPNI issue has been remanded to the FCC and should be left to the Commission's consideration.

## III. CERTIORARI SHOULD BE DENIED BECAUSE THE TENTH CIRCUIT APPLIED SETTLED LAW AND CREATED NO CIRCUIT SPLIT.

Certiorari is inappropriate for the further reason that the Court of Appeals applied settled First Amendment principles as reflected in the *Central Hudson* test. The Tenth Circuit created no circuit split and faithfully followed governing precedent.

Moreover, the Tenth Circuit's decision is a modest one that can be read as resting on the principle of constitutional avoidance reflected in *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring). The Tenth Circuit held that either the FCC's rules violate the First Amendment or, "at the very least, . . . the CPNI regulations clearly raise a serious constitutional question, invoking the rule" (Pet. App. 33a) of

interpreting statutes to avoid a constitutional doubt. *E.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

This case manifestly involves no novel legal principle or unresolved question of law. Instead, the Tenth Circuit's decision is fact-specific and highly dependent on the particular administrative record assembled before the FCC. Certiorari is unwarranted because this Court's review would be limited to the case-specific application of settled law to the facts of this record.

### A. The Tenth Circuit Applied Settled Law

The Tenth Circuit properly held that, while "privacy may rise to the level of a substantial state interest," "the government cannot satisfy the second prong of the *Central Hudson* test by merely asserting a broad interest in privacy. It must specify the particular notion of privacy and interest served." Pet. App. 19a. The court noted that "[n]either Congress nor the FCC explicitly stated what 'privacy' harm Section 222 seeks to protect against." *Id.* at 21a.

The FCC acknowledged that customer approval "can be *inferred* in the context of an existing customer-carrier relationship" in some circumstances. *CPNI Order* at ¶ 23 (emphasis in original). Thus, the FCC agreed "that Congress recognized . . . that customers expect carriers with which they maintain an established relationship will use information derived through the course of that relationship to improve the customer's existing service" (*id.* at ¶ 54); that there are no significant privacy concerns with respect to the sharing of CPNI within an integrated firm (*id.* at n. 203); and that "customers expect their carriers to offer related offerings within the total service to which they subscribed." *Id.* at n. 372; *see also* n. 206. Inexplicably, however, the FCC insisted that customer marketing expectations do not "extend to all of a carrier's available service offerings." *Id.* at n.372. The Commission could cite no evidence to support this hair-splitting assertion.

Because the *CPNI Order* contended that "CPNI includes information that is extremely personal to customers" (¶ 2), which the FCC described as "sensitive" (¶ 94), the Tenth Circuit correctly inferred that the government's point was "that disclosure of CPNI information could prove embarrassing to some and that the government seeks to combat this potential harm." Pet. App. 21a. The Court of Appeals then concluded that the FCC had failed to show how its rules would directly and materially advance this interest, or that its rules were narrowly tailored — *i.e.*, that they were "no more extensive than necessary to serve [the stated] interests." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486 (1995). The narrow tailoring test could not be met in light of the obvious and familiar alternative of a notice and opt-out approach, *see, e.g.*, Fed. R. Civ. P. 23(c)(2) (notice and opt-out procedures in class actions), with more stringent rules reserved for third-party disclosures as may be deemed appropriate. *See* pp. 9-10, *supra.*

The notice and opt-out alternative that the FCC failed adequately to consider fully protects "customer control" by allowing customers to disapprove even a carrier's internal use of CPNI. The FCC presented no evidence or reasoned analysis to show that the failure of most customers to opt out was the product of anything other than apathy and inertia. As the Tenth Circuit found, the results of a study on which the FCC relied "may simply reflect that a substantial number of individuals are ambivalent or disinterested in the privacy of their CPNI or that consumers are averse to marketing generally." Pet. App. 30a-31a. The Tenth Circuit's reasoning was entirely consistent with the FCC's own longstanding position, endorsed by the Ninth Circuit, that requiring CPNI authorizations from customers was impracticable and unnecessary and would result in substantial denials of consents due simply to customer inertia, apathy, and confusion. *See* pp. 4-6, *supra.*

The Court of Appeals' decision is thus wholly unremarkable. The Tenth Circuit simply applied the fundamental maxim that, when the federal government adopts rules restricting expression,

the government must be careful to limit such restrictions to the scope necessary actually to accomplish whatever important purpose has been identified. As this Court has repeatedly instructed, restrictions on commercial speech cannot be justified by mere guesswork. *See Greater New Orleans Broadcasting Council v. United States*, 119 S. Ct. 1923, 1931-33 (1999); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 500 (1996) (plurality opinion); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487-90 (1995); *Ibanez v. Florida Dept. of Business & Professional Reg.*, 512 U.S. 136, 142-44 (1994); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416-17 (1993); *Edenfield v. Fane*, 507 U.S. 761, 767-68 (1993). The Tenth Circuit's judgment rests on nothing more controversial than this elementary principle.

The FCC rules failed this uncontroversial standard. Indeed, they failed every prong of the test for restrictions on commercial speech. They were so far from the realm of reasoned administrative analysis required by the Administrative Procedure Act, let alone the First Amendment, that the rules in fact *disserved* customer privacy. By preventing telephone companies from tailoring communications to specific customers with particular interests, the FCC would have forced telephone companies to solicit *all* their customers blindly, without any attempt at targeting — an approach that would have increased the number of dinner-time phone solicitations, which the FCC itself has described as a nuisance. *See BNA Third Order on Reconsideration*, 11 FCC Rcd 6835, 6848-49 (1996).

In addition to presenting serious constitutional questions, the FCC's requirement of explicit affirmative consent was in tension with both the text of Section 222(c)(1) and its legislative history. Rather than requiring affirmative customer consent, Congress *deleted* the term "affirmative" from predecessor bills when it enacted Section 222. Congress sought to facilitate "one-stop shopping" and joint marketing of telecommunications services, which the FCC attempted to prevent telephone companies from offering. *See* pp. 7-8, *supra*.

Thus, wholly apart from its constitutional defects, the FCC's construction of Section 222 was unreasonable and arbitrary in several fundamental respects: it contradicted Congress' intent in enacting Section 222; represented a sudden and unwarranted departure from prior Commission policy regarding a carrier's own use, including among its affiliates, of CPNI; and was virtually unprecedented in American industry, where cable operators, credit card companies, on-line retailers, and almost all other businesses are allowed to collect and use individually identifiable customer information – regardless of "privacy" concerns.

In light of the serious constitutional questions under the First Amendment raised by the FCC's interpretation of Section 222, the Tenth Circuit was bound, if possible, to construe the statute to avoid those constitutional questions. *E.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Indeed, the FCC's very efforts to brush off these grave constitutional issues warranted vacating the CPNI rules, because that failure "to give adequate consideration" to constitutional objections to agency action is "the very paradigm of arbitrary and capricious administrative action." *Meredith Corp. v. FCC*, 809 F.2d 863, 865, 874 (D.C. Cir. 1987).

### B. The "Privacy" Interest Cited By CPI Is Inconsistent With The Administrative Record

CPI refers repeatedly to the "privacy" interests implicated by the transfer of CPNI "mailing lists" (Pet. 9) or by "the disclosure of private customer information information." *Id.* at 6. But the CPI petition should be denied because the "privacy" interest arising from the disclosure of CPNI to unaffiliated third parties was not meaningfully analyzed by the FCC. In fact, CPI's argument finds no support in the administrative record.

In the administrative proceeding before the FCC, telephone carriers such as U S WEST had acknowledged that the

Commission could well draw a distinction between a carrier's internal use of CPNI and a carrier's disclosure of such information to third parties. Survey after survey has shown that consumers draw precisely such a distinction: they expect customer information to be shared within the corporate family with which they have an established business relationship, but desire greater control when it is disclosed to third parties like telemarketers. Accordingly, U S WEST argued that, even if the FCC were to adopt an opt-in approach for third-party disclosures, the evidence showed that a prior affirmative consent requirement was utterly unwarranted for carrier use of CPNI to speak to its customers. The FCC ignored this evidence. *See* pp. 9-13, *supra.*

Hence, CPI's effort to use "privacy" as a justification for the CPNI regulations has no basis in the administrative record. In fact, the record shows that any "privacy" interest arises only with respect to third-party disclosures, not with respect to internal carrier use of CPNI. There is thus a fatal mismatch between the administrative record and the "privacy" interest asserted by CPI.

### C. CPI's Criticisms of the Decision Below Are Misplaced

CPI makes a number of criticisms of the Tenth Circuit's decision. Even if the criticisms were valid, they would not warrant certiorari. At most, CPI has challenged the Court of Appeals' application of settled law for entirely fact-specific reasons. In any event, CPI's attacks on the Tenth Circuit rest on caricature and misinterpretation.

First, CPI contends that the CPNI rules do not raise any First Amendment issue at all, because CPNI is data, not speech, and that the rules thus do not represent "a direct ban on communication with customers." Pet. 9. The Tenth Circuit expressly considered and properly rejected these arguments, and there is no warrant for revisiting its decision. Pet. App. 11a-13a, 17a-18a n.5.

CPNI is an essential ingredient of communication. CPNI is

to telephone carriers what wire stories are to newspapers: the raw source material from which information and communications are crafted. CPNI is data, but the communication of data is the essence of speech. This Court has applied the First Amendment to regulations falling on *physical objects* (let alone clusters or bits of information) that are essential ingredients in expression. *E.g., Minneapolis Star v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 581 (1983) (newsprint and ink).

The obvious, and indeed not genuinely disputed, practical effect of the CPNI rules is to choke off two separate kinds of speech. First, the CPNI rules have a prohibitive effect on CPNI-related communications within a telecommunications carrier, and within the carrier's corporate family: different divisions, affiliates, and personnel within the same carrier will not be able to engage in CPNI-related speech because prior affirmative consents will in the vast majority of cases be difficult or impossible to obtain, not because of customer objection but because of customer apathy. An employee in the landline division, for example, will be prohibited from communicating CPNI-related information to her counterpart in the wireless division.

Second, if prior affirmative consents cannot be obtained, carriers will be forbidden from using CPNI to discuss with customers various related categories of services and products those customers may need or desire. The rights of both speaker and audience are thereby infringed. The FCC acknowledged that its interpretation of Section 222 might "constrain carriers' ability to more easily 'target' certain customers for marketing." *CPNI Order* at ¶ 106. The Commission did not, and could not, dispute that requests for affirmative consent have extremely low response rates. In fact, the FCC itself pointed to the U S WEST trial to show that U S WEST's outbound mail campaign produced affirmative consents in the range of 6-11% and that only about 29 percent of customers give their consent when called by a carrier. *Id.* at ¶ 111. The FCC acknowledged that its *Order* "might make incumbent carriers' marketing efforts less

effective and potentially more expensive" (*id.* at ¶ 66) and cited comments indicating that "restricting intra-firm use of CPNI makes product development and marketing more costly and less efficient, thereby raising prices and reducing the quality and variety of service." *Id.* at n.244. Before the Tenth Circuit, the FCC acknowledged, as the record in this case proves, that "[t]he carriers are almost certainly correct in their expectation that many customers will not give them advance approval" and that "customers would not give affirmative approval for use of their CPNI in a high percentage of cases – regardless of the level of confidence that might have built up over the years of the carrier-customer relationship." FCC Br. 19.

The CPNI rules thus prevent individualized or customized speech – and they do so beyond any degree that might be warranted by concerns for privacy. A carrier's ability to use mailing lists or customer research data to attempt to tailor its speech to its customers (Pet. 14) is not an adequate substitute because audiences are not fungible, *see Schneider v. State of New Jersey*, 308 U.S. 147, 163 (1939), and there is no guarantee that these measures would allow a carrier to reach *the same customers* as would the use of CPNI. "The First Amendment protects [the speakers'] right not only to advocate their cause but also to select what they believe to be the most effective means for doing so." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). Thus, in *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), this Court recognized an attorney's First Amendment right to send targeted solicitation letters to potential clients by name. *See also Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (CPA's right to engage in in-person solicitation); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488 (1995) (right to disclose alcohol content on beer labels (targeted speech)).

CPI apparently concedes that, if the CPNI rules explicitly barred carriers from engaging in individualized and customized speech, then the First Amendment would be implicated. CPI takes the view that, short of such an express ban, the practical impact of the CPNI rules on carriers' communications with their

customers is not constitutionally cognizable. There is no legal support for that argument. In fact, this Court squarely rejected it in *Riley v. National Federation of the Blind, Inc.*, 487 U.S. 781 (1988). There, this Court held that a financial regulation of professional fundraisers could not be defended as a "merely economic" regulation having "only an indirect effect on protected speech." *Id.* at 789 n.5. This Court struck down under First Amendment scrutiny a rule limiting a professional fundraiser to a "reasonable" fee, even though by its terms the law did not ban any speech at all. *See also Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984) (striking down on First Amendment grounds a statute regulating contracts between charities and professional fundraisers and forbidding such contracts if, after allowing a deduction for many of the costs associated with the solicitation, the fundraiser retained more than 25% of the money collected); *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) (invalidating local ordinance requiring charitable solicitors to use 75% of funds solicited for charitable purposes). This Court has frequently applied the First Amendment to strike down other laws that did not by their terms prohibit speech, but that simply regulated activities having a connection to expression. *E.g., NTEU v. United States*, 513 U.S. 454, 469 (1995) (striking down a ban on honoraria because it decreased the "incentive" of government employees to speak); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105 (1991) (invalidating New York's "Son of Sam" law, which prevented criminals from profiting from publishing deals involving stories about their crimes).

In none of these cases did this Court require an explicit ban on speech before finding the First Amendment applicable. Rather, this Court has always looked to the practical effect of a law on communicative activity. Consider, for example, *Martin v. Struthers*, 319 U.S. 141 (1943), on which CPI puts great emphasis. The ordinance invalidated in *Martin* did not actually *prohibit* speech in the form of uninvited door-to-door

solicitation; the ordinance merely made it unlawful "for any person distributing handbills, circulars, or other advertisements to ring the door bell, sound the door knocker, or otherwise summon the inmate or inmates of any residence to the door . . . ." *Id.* at 142. The solicitor was free to distribute handbills; he or she simply could not ring or knock unless previously invited. Similarly, in *Meyer v. Grant,* 486 U.S. 414, 424 (1988), this Court struck down a ban on the payment of petition circulators – not a rule restricting what they could say or controlling *any* feature of their speech as such. And in *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 912 (1982), this Court held that even generally applicable tort laws (which did not target speech at all) were unconstitutional as applied to an expressive boycott because of the "incidental effect on First Amendment freedoms."[11]

Next, CPI claims that the Tenth Circuit misapplied the "narrow tailoring" requirement and instead imposed a "least restrictive alternative" test. Pet. 17-19. That is patently untrue. The Tenth Circuit expressly recognized that "clearly the government need not employ the least restrictive means to accomplish its goal." Pet. App. 28a. "We do not require the government to consider every conceivable means . . . . We merely recognize the reality that the existence of an obvious and substantially less restrictive means for advancing the desired government objectives indicates a lack of narrow tailoring." *Id.* at 29a-30a n.11. This approach is fully consistent with, and indeed mandated by, this Court's precedent. *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 517 (1996) (plurality opinion) ("It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the [Government's] goal."); *Rubin v. Coors*

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[11] This case of course does not involve a restriction upon access to government information, as in *Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 120 S. Ct. 483 (1999). CPNI is information within a telephone carrier's possession.

*Brewing*, 514 U.S. at 490 ("We agree that the availability of these options, all of which could advance the Government's asserted interest in a manner less intrusive to respondent's First Amendment rights, indicates that [the statute] is more extensive than necessary."); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 & n.13 (1993) (considering possible alternatives to restriction on speech); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980) (government must make showing "that a more limited restriction" on speech "would not serve adequately the [governmental] interests"). The proven efficacy of a notice and opt-out option demonstrates that the stringent approach taken in the *CPNI Order* is not narrowly tailored to the asserted interest.

Finally, CPI suggests that the Tenth Circuit failed to defer to administrative and congressional policy judgments and engaged in an improper "collateral attack" on Section 222. However, the legal issue framed by CPI is not presented by this case. There are no congressional findings to support the FCC's rules, and the Tenth Circuit's invalidation of the FCC's regulations is not an indirect attack on Section 222 itself. The FCC does not and cannot claim that its approach was compelled by Section 222, and the FCC cannot hide behind Congress in justifying the CPNI rules. The constitutional defect in the rules is not a "facial" one inhering in Section 222; the constitutional issues arise solely from the interpretation adopted by the FCC. The FCC has acknowledged that the term "approval" is "ambiguous" and that "section 222(c)(1) does not specify what kind of approval is required." *CPNI Order* at ¶¶ 86, 87. The word "approve," "in its strictest etymological construction, is an after-the-fact ratification." *AT&T Communications, Inc. v. Southwestern Bell Tel. Co.*, No. A 96-CA-397 SS, at 9-10 (W.D. Tex. 1996). The FCC itself cited a dictionary definition of "approve" as meaning "ratify." *CPNI Order* at ¶ 91 n.336. Nowhere is there clear statutory authorization for the FCC's gratuitously severe interpretation of Section 222 to require explicit prior affirmative consent.

In any event, CPI is wrong because a court reviewing challenged agency regulations is not required to assume the constitutionality of the underlying statute and indeed is perfectly entitled to rule on the statute's validity. *See, e.g., Denver Area Educ. Telecom. Assn., Inc. v. FCC*, 518 U.S. 727 (1996) (striking down statutory provisions based on a challenge to implementing regulations). If the Tenth Circuit had concluded that Section 222 compelled the action taken by the FCC, it would have had the power and, indeed, the duty to hold the statute unconstitutional. The Tenth Circuit would not have been required blindly to accept any detailed congressional findings in support of the FCC's CPNI rules. "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978). Both in *Greater New Orleans Broadcasting*, 119 S. Ct. at 1932-35, and in *Coors Brewing*, 514 U.S. at 487-91, this Court refused to defer to congressional policy judgments and invalidated federal statutes under intermediate scrutiny. In *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), a plurality of the Court explained that, even when Congress itself makes "unusually detailed" factual findings that "are recited in the text of the Act itself," 512 U.S. at 632, 646 — which Congress did *not* do in Section 222 — under intermediate First Amendment scrutiny a reviewing court is obligated to exercise "independent judgment" to ensure that the Government has "demonstrated that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* at 665, 666.[12]

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[12] The cable must-carry rules at issue in *Turner Broadcasting* were ultimately upheld on remand. This Court noted, in addition to the extensive factual findings made by Congress in the text of the statute itself, "a record of tens of thousands of pages" supporting the rules. *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 187 (1997) (*Turner II*) (internal quotation omitted). Nothing of the sort exists in this case.

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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No. 99-1427

# In the Supreme Court of the United States

COMPETITION POLICY INSTITUTE, PETITIONER

*v.*

U S WEST, INC., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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## QUESTION PRESENTED

In 47 U.S.C. 222(c)(1) (Supp. III 1997), Congress provided that a telecommunications carrier that obtains information about an individual customer's calling pattern through its provision of telecommunications services to that customer may use that information only incident to its provision of the telecommunications service from which the information was derived, "[e]xcept as required by law or with the approval of the customer." In a regulation implementing Section 222, 47 C.F.R. 64.2007, the Federal Communications Commission (FCC) required that, to obtain customer approval for further use of the customer's calling information, the carrier must obtain the express permission of the customer. The question presented is whether that regulation requiring such express customer permission is a proper implementation of Section 222(c)(1), in light of asserted First Amendment concerns.

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## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-54a) is reported at 182 F.3d 1224. The Federal Communications Commission's Report and Order that is the subject of the court of appeals' decision is reported at 13 F.C.C.R. 8061.

### JURISDICTION

The judgment of the court of appeals was entered on August 18, 1999. Petitions for rehearing were denied on November 30, 1999 (Pet. App. 90a-92a). The petition for a writ of certiorari was filed on February 28, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. This case involves a challenge to regulations of the Federal Communications Commission (FCC) implementing provisions of the Telecommunications Act of 1996 (the 1996 Act or the Act), Pub. L. No. 104-104, 110 Stat. 56, intended to protect privacy of customer information and to promote competition in telecommunications services. The 1996 Act established a new national policy framework for telephone and related services, designed to promote competition in both local and long-distance markets. See generally *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999); *SBC Communications Inc.* v. *FCC*, 138 F.3d 410, 412-413 (D.C. Cir. 1998).

As part of the new framework, Congress adopted 47 U.S.C. 222 (Supp. III 1997), entitled "Privacy of customer information," to govern the use that telecommunications carriers may make of customer information that carriers obtain in their provision of service. Section 222 places on all telecommunications carriers "a duty to protect the confidentiality of proprietary information of * * * customers," 47 U.S.C. 222(a) (Supp. III 1997), and to that end restricts the use that telephone carriers may make of "customer proprietary network information" (CPNI), 47 U.S.C. 222(c)(1) (Supp. III 1997). CPNI includes information about customers' individual calling patterns, such as the specific numbers that an individual customer calls, as well as when and how often an individual customer makes calls.[1] See 47 U.S.C. 222(f)(1) (Supp. III 1997). CPNI

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[1] The statute defines CPNI as "information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the

does not include aggregate customer information, that is, information relating to groups of services or customers from which individual identities and characteristics have been removed. See 47 U.S.C. 222(c)(3) and (f)(2) (Supp. III 1997).

The provision central to this case, Section 222(c)(1), states:

> Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.

The Act thus prohibits carriers from using an individual customer's CPNI unless that customer "approv[es]" such use, or unless the CPNI is used in the carriers' provision of "the telecommunications service from which such information is derived," or services incident thereto. That restriction prevents carriers from disclosing customer information to third parties, such as other carriers; it also limits carriers' ability to use their customers' information themselves—for example, in the development of an individually customized marketing

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carrier by the customer solely by virtue of the carrier-customer relationship," and as "information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier." 47 U.S.C. 222(f)(1)(A) and (B) (Supp. III 1997).

strategy for a telecommunications service other than the one from which the CPNI was derived.

2. In 1998, the FCC issued regulations to clarify the Act's requirements for carriers' use of CPNI. In its Report and Order accompanying the regulations, the FCC addressed two principal issues: (1) the scope of the phrase "telecommunications service from which such information is derived," as used in Section 222(c)(1)(A), and (2) the requirement that a carrier obtain "customer approval" for use of CPNI outside the telecommunications service from which it was derived. See Pet. App. 55a-89a (excerpts of FCC Report and Order); *In re Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Second Report and Order* (FCC Report and Order), 13 F.C.C.R. 8061 (1998) (full text of FCC Report and Order).

a. In construing the phrase "telecommunications service from which such information is derived," in Section 222(c)(1)(A), the FCC adopted a "total service approach," which permits a carrier to use a customer's CPNI, without the customer's prior approval, incident to any telecommunications service that it provides to that customer. The FCC understood Section 222(c)(1)(A) to distinguish among telecommunications services along traditional service lines—such as local, interexchange (long-distance), and cellular service. Pet. App. 75a. The FCC further concluded that the Act permits carriers to use a customer's information without prior approval within the bounds of the existing service relationship with the customer. For example, if a telecommunications carrier provides both local and cellular service to a customer, it may use a customer's

CPNI obtained from either service to market offerings incident to either service to that customer. The carrier may not, however, use that CPNI to market long-distance service to that customer, without the customer's approval.[2] *Id.* at 72a-73a.

b. The FCC also considered how a carrier may obtain customer "approval" for use of CPNI beyond the service from which it was derived. The FCC concluded that the term "approval" should be interpreted "in a manner that will best further consumer privacy interests and competition, as well as the principle of customer control" of CPNI. Pet. App. 81a. In light of those statutory objectives, the FCC concluded that "carriers must obtain express written, oral, or electronic approval" by a customer to use a customer's CPNI beyond the existing service relationship. *Ibid.* Such an "opt-in" approach, the FCC reasoned, would best ensure that customers confer knowing approval of the use of their information. See *id.* at 85a; see also *ibid.* (observing that "approval" connotes "an informed and deliberate response"). The FCC rejected an "opt-out" regime, under which a carrier could use CPNI beyond the existing service relationship as long as it had made a request to a customer for permission to use CPNI in that manner and the customer had not expressly objected to such use. An opt-out regime, the FCC explained, would not ensure informed consent, because customers might not read carriers' disclosures

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[2] The FCC also determined that carriers may use customer information for the provision of inside wiring installation, maintenance, and repair services because these are services "necessary to, or used in, the provision" of the telecommunications service to which the customer subscribes, as provided for by the Act. Pet. App. 74a; see 47 U.S.C. 222(c)(1) (Supp. III 1997).

and might not comprehend the extent of their rights under the Act or the steps they must take to protect those rights. *Id.* at 85a-86a. With respect to promoting competition, the FCC found that an opt-in requirement limits the advantage that incumbent carriers have over new competitive entrants. *Id.* at 86a.

3. Respondent U S West, Inc., filed a petition for review, contending that the regulation's opt-in requirement for customer approval is arbitrary and capricious and violates the First and Fifth Amendments to the Constitution. A divided panel of the court of appeals vacated the regulation. Pet. App. 1a-54a.

a. The court declined to review the FCC's regulation and interpretation of the 1996 Act under traditional deferential administrative-law standards, in light of what it perceived as the "serious constitutional questions" raised by the opt-in regulation. Pet. App. 9a-11a. Rather, the court determined that it should analyze the validity of the regulation under the constitutional standards applicable to regulations of commercial speech.[3] See *id.* at 13a; *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557 (1980).

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[3] In conducting that analysis, the court first determined that the CPNI regulation does in fact restrict speech. Pet. App. 11a-13a. In so ruling, the court rejected the government's point that the regulation does not prevent a carrier from communicating to any of its customers or limit anything that a carrier may say to its customers, but merely prohibits the carrier from using CPNI to determine how to target its marketing campaigns to particular customers. The court reasoned that "a restriction on speech tailored to a particular audience, 'targeted speech,' cannot be cured simply by the fact that a speaker can speak to a larger indiscriminate audience, 'broadcast speech.'" *Id.* at 12a.

In employing the *Central Hudson* analysis, the court initially questioned whether the government had demonstrated that the interests it put forward in regulating CPNI, protecting customer privacy and fostering competition, are substantial. Pet. App. 18a-26a.[4] The court ultimately decided to assume for the sake of argument that the government had asserted a substantial interest in protecting customers from the disclosure of "sensitive and potentially embarrassing personal information." *Id.* at 22a. On the other hand, the court declined to conclude that promoting competition was a significant consideration in Congress's enactment of Section 222. That Section, the court reasoned, contains no explicit mention of competition, but rather reflects a dominant concern with the protection of privacy. *Id.* at 23a-24a. The court did accept, however, that Congress "may not have completely ignored competition in drafting [Section] 222," and so it agreed to consider that interest "in concert with the government's interest in protecting consumer privacy." *Id.* at 26a.

The court next concluded that the government had not met its burden of demonstrating that the regulation directly and materially advances its interests in protecting privacy and promoting competition. Pet. App. 26a-28a. It reached that conclusion in large part based on its reading of the FCC Report and Order as disclaiming any privacy concerns implicated by disclosure

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[4] "[P]rivacy," the court stated, "is not an absolute good because it imposes real costs on society," Pet. App. 19a, and so "privacy may only constitute a substantial [governmental] interest if the government specifically articulates and properly justifies it," *id.* at 20a. The court also suggested that "[a] general level of discomfort from knowing that people can readily access information about us does not necessarily rise to the level of a substantial [governmental] interest under [*Central Hudson*]." *Id.* at 21a.

of CPNI within a carrier corporation.[5] *Id.* at 27a. The court also stated that the FCC had only "theorize[d]" as to how competition would be impeded by permitting incumbent carriers to use CPNI obtained in their existing service relationship to market new services to their customers. *Id.* at 28a.

In the centerpiece of its decision, the court concluded that the opt-in regime is not narrowly tailored because the FCC had failed adequately to consider an "opt-out" alternative, which the court believed is less restrictive of speech. Pet. App. 30a. The court rejected in particular the FCC's reliance on a marketing study conducted by U S West that showed that a majority of individuals, when contacted for approval to use their CPNI, declined to grant approval. That study, the court concluded, does not provide sufficient evidence that customers do not want carriers to use their CPNI because it may show only that "individuals are ambivalent or disinterested in the privacy of their CPNI or that customers are averse to marketing generally." *Id.* at 31a. Further, the court concluded, the FCC record does not show adequately that an opt-out strategy would *not* sufficiently protect customer privacy, and the court declined to defer to the FCC's "common sense judgment" and "experience" on that point. *Ibid.*

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[5] The Court quoted a footnote in the FCC Report and Order explaining that customers ordinarily would not be concerned about the sharing of information within different parts of a carrier corporation that offers local, cellular, and long-distance services. See Pet. App. 27a. The Court overlooked the rest of that footnote, however, which states that customers do expect such information to be disclosed only for the purpose of improving the services the customer already receives. See FCC Report and Order, 13 F.C.C.R. at 8103 n.203.

The basis for the court's decision is best set out in its brief "Conclusion." The court there stated:

> The FCC failed to adequately consider the constitutional implications of its CPNI regulations. Even if we accept the government's proffered interests and assume those interests are substantial, the FCC still insufficiently justified its choice to adopt an opt-in regime. Consequently, its CPNI regulations must fall under the First Amendment. At the very least, the foregoing analysis shows that the CPNI regulations clearly raise a serious constitutional question, invoking the rule of constitutional doubt.

Pet. App. 33a. The court also remarked, however, that it was not requiring the FCC to adopt an "opt-out" approach, explaining that it was "merely find[ing] fault in the FCC's inadequate consideration of the approval mechanism alternatives in light of the First Amendment." *Id.* at 33a n.15.

b. Judge Briscoe dissented. Pet. App. 34a-54a. Employing the analysis of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984), she concluded that the CPNI regulation is consistent with Section 222 because the statute does not indicate the precise method that a carrier must use to obtain customer approval, Pet. App. 38a, and the FCC's opt-in approach "legitimately forwards Congress' goal of ensuring that customers give informed consent for use of their individually identifiable CPNI," *id.* at 40a. She also concluded that the constitutional challenges raised by U S West are without merit and were not sufficiently serious to call for reliance on the

canon of statutory construction of avoiding constitutional doubts.[6] *Id.* at 41a-42a.

As an initial matter, Judge Briscoe questioned whether the challenged regulation has any impact on expressive activity at all, because it does not directly affect the manner in which a carrier may speak. Pet. App. 43a. Assuming the regulation is subject to First Amendment scrutiny, however, Judge Briscoe nonetheless found it valid. She first concluded that the government had demonstrated substantial interests in protecting customer privacy and promoting competition. She emphasized that those interests, reflected in the statute itself, originated in Congress, and that the FCC was bound faithfully to implement Congress's directive to require some form of customer approval. *Id.* at 46a-47a. She next found that the challenged regulation plainly promotes customer privacy and competition and that, in any event, it was "wholly unnecessary for the FCC to collect or consider any evidence regarding these two Congressional interests." *Id.* at 49a. Finally, she concluded that the opt-in method is narrowly tailored because "[t]he administrative record convincingly demonstrates" that the principal (and purportedly less restrictive) alternative suggested by U S West, an opt-out method, will "not ensure the Congressional goal of informed customer consent would be satisfied." *Id.* at 50a.

4. The government filed a petition for rehearing and suggestion for rehearing en banc. The panel denied the

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[6] Judge Briscoe suggested that U S West's constitutional arguments are more appropriately aimed at the statute than the regulation and observed that U S West has not challenged the constitutionality of Section 222 itself. Pet. App. 42a-43a.

petition for rehearing, and the full court denied en banc review by a six to five vote. Pet. App. 90a-92a.

**ARGUMENT**

The court of appeals erred in invalidating the FCC's regulation requiring telecommunications carriers to obtain express customer approval to use a customer's CPNI for purposes beyond the telecommunications service from which the CPNI was derived. The court failed to accord the proper deference to the FCC's reasonable interpretation of the 1996 Act's "customer approval" requirement in 47 U.S.C. 222(c)(1) (Supp. III 1997). The court was also mistaken in its constitutional analysis of the CPNI regulation.

Nevertheless, certiorari is not warranted at this time to review the court of appeals' decision. The court of appeals struck down only the FCC's regulation, and did not hold that Section 222 itself is invalid. Moreover, the court made clear that it was not directing that the FCC adopt any particular regime on remand, and it therefore did not deny the FCC discretion to devise an approval requirement that will fulfill the 1996 Act's goals of protecting customer privacy and promoting competition. To the extent the court of appeals' decision was based on its perception that the administrative record was inadequate to sustain the validity of a particular scheme to regulate use of CPNI, proceedings on remand may also address that concern.[7]

1. a. The court of appeals' decision invalidating the FCC's CPNI regulation is in error. Indeed, the court's

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[7] Although we have not filed a certiorari petition seeking review of the court of appeals' decision and argue here that the Court should not grant certiorari at this juncture, should the Court grant the petition we will defend the FCC's regulation on the merits.

entire methodology in analyzing that regulation is seriously flawed. The court was properly presented only with a challenge to the reasonableness of the FCC's regulation implementing the statutory requirement that carriers obtain customer approval if they wish to use CPNI for purposes beyond the telecommunications service from which it is derived. Respondent U S West did not raise a constitutional challenge to the underlying statute. Yet, without questioning that the FCC's regulation is faithful to the intent of Congress, the court engaged in an extensive constitutional analysis of the FCC's regulation and faulted the FCC for failing to develop an administrative record adequate to sustain the constitutionality of the regulation, even though the regulation serves interests written into law by Congress. The court was surely authorized to determine whether the FCC's regulation, including the construction of statutory terms that the regulation reflects, is consistent with the statute and is otherwise not arbitrary or capricious. But if that regulation is consistent with the statute (and we submit it is), then it was not appropriate for the court to find constitutional fault with the FCC for adopting a regulation that is faithful to a statute that has not itself been challenged as unconstitutional.

It is, moreover, far from clear that the regulation implicates carriers' free speech interests at all. As the dissent recognized (Pet. App. 43a-44a), neither Section 222 nor the FCC's regulation prevents any carrier from speaking. Section 222 merely requires carriers to obtain customer approval before using CPNI in certain circumstances, and the FCC regulation merely implements the Act's approval requirement, "adop[ting] from an extremely limited range of choices the particular method a carrier must use in obtaining customer

approval."[8] *Id.* at 43a. Nor is an opt-in regime categorically more restrictive of speech than an opt-out regime. Neither approach directly restricts any carrier's ability to speak to its customers, and both require the carrier to obtain approval, in one way or another, before putting customer information to use in developing particular marketing strategies. Carriers may continue to market any available service even to customers who refuse permission to use their CPNI. Neither the statute nor the regulation prohibits any customer from receiving solicitations, and neither requires any carrier to add anything to or delete anything from any message to potential customers. Cf. *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697, 706 (1986) (noting that "we have not traditionally subjected every criminal and civil sanction imposed through legal process to 'least restrictive means' scrutiny simply because each particular remedy will have some effect on the First Amendment activities of those subject to sanction").

b. Even if First Amendment scrutiny is apposite, the court of appeals erred in concluding that the FCC regulation fails First Amendment review. The FCC regulation raises no serious concern under the constitutional analysis for commercial speech, properly applied. Under that analysis, the regulation is constitutional if it directly advances a substantial governmental interest and if it is narrowly tailored to serve that interest. See *Central Hudson Gas & Elec. Co.* v. *Public Serv. Comm'n*, 447 U.S. 557, 566 (1980). The court found two

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[8] In the course of the rulemaking proceeding, carriers identified only three possible methods of obtaining customer approval: (1) express written approval, (2) express written, oral, or electronic approval, or (3) approval implied through customer's failure to opt-out of carrier's use of CPNI. Pet. App. 38a.

constitutional deficiencies in the FCC's regulation: first, it concluded that the regulation does not directly advance either privacy or procompetitive interests, and second, and more centrally, it ruled that the regulation is not narrowly tailored to serve those interests. Both conclusions are erroneous.[9]

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[9] As we have noted above (see pp. 6-7, *supra*), the court also questioned whether the FCC had adequately demonstrated that the governmental interests assertedly served by the regulation, customer privacy and competition, are substantial interests. See Pet. App. 18a-26a. The court eventually assumed, however, that preventing customer embarrassment from disclosure of CPNI is a substantial interest, see *id.* at 22a, and it did not completely discount the interest in promoting competition, see *id.* at 26a. Although the court's constitutional ruling therefore does not ultimately rest on a conclusion that the interests put forward by the FCC are not substantial, we nonetheless observe that the doubts expressed by the court about the substantiality of those interests lack force.

First, the court believed that the FCC had failed to provide an adequate explanation of the privacy interest served by its regulation. But as we have explained, the statute itself requires customer privacy to be protected, see 47 U.S.C. 222(a) (Supp. III 1997), and the FCC was charged with carrying out Congress's directive to protect the privacy interest identified in the statute. Thus, as the dissent recognized, it was not the FCC's task to justify or explain the privacy interest; rather, "the FCC was obligated to implement without question Congress' directive to require some form of customer approval." Pet. App. 47a. In addition, the government unquestionably has a substantial interest in protecting the privacy of personal information, especially, as even the majority recognized, in this age of "exploding information." *Id.* at 2a. Finally, although the majority indicated that "Congress did not intend for competition to be a significant purpose of [Section] 222," *id.* at 24a, that suggestion is also wrong. The overarching purpose of the 1996 Act was to "promote competition," see Pub. L. No. 104-104, 110 Stat. 56 (preamble), and the legislative history of Section 222 makes clear that it was specifically intended to foster the dual

(i) Contrary to the majority's conclusion, the FCC's customer approval requirements plainly further the statute's twin goals of protecting customer privacy and furthering competition. As for the privacy interest, the FCC determined that an opt-in approach will most effectively ensure that CPNI will not be used unless customers have given their informed consent to such use. Without customer approval, a carrier may neither use CPNI itself for purposes other than the service from which the CPNI was derived nor disclose it to anyone else.

The court found that privacy interest fatally undermined by a footnote in the FCC Report and Order to the effect that customers would not perceive their privacy invaded by having CPNI disclosed *within* a carrier. Pet. App. 27a. But the court misunderstood the footnote (or overlooked most of it); while the FCC expressed the view that customers do expect to have CPNI used within their *existing* service relationship with a carrier, it concluded that customers *do not* have the same expectation when the carrier seeks to use CPNI *beyond* the existing service relationship. See FCC Report and Order, 13 F.C.C.R. 8061, 8103 n.203 (1998). That footnote is consistent with the rest of the FCC Report and Order, in which the FCC concluded that customers "do not expect that carriers will use CPNI to market offerings outside the total service to which they subscribe." *Id.* at 8107 (italics omitted).

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purposes of protecting privacy and promoting competition. The Conference Report accompanying the 1996 Act explains that Section 222 "strives to balance both competitive and consumer privacy interests with respect to CPNI." S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 205 (1996).

The opt-in requirement also directly advances the congressional interest of promoting competition. Restricting incumbents' use of CPNI derived from long relationships with customers limits their advantages over new entrants into telecommunications markets, who cannot rely on accumulated CPNI from years of service to target their marketing efforts. FCC Report and Order, 13 F.C.C.R. at 8134.

(ii) The panel focused much of its criticism on the FCC's supposed failure to consider the opt-out approach as a less restrictive alternative to the opt-in requirement.[10] See Pet. App. 30a. In fact, the FCC gave extensive consideration to the relative merits of the opt-in and opt-out approaches, and it determined quite explicitly that the governmental interests in protecting privacy and promoting competition would not be served as well by an opt-out approach. See *id.* at 82a-88a. The FCC also explained that its "conclusion [was] guided by the natural, common sense understanding of the [statutory] term 'approval,' which

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[10] The panel nowhere explained, however, why an opt-out approach is less restrictive of speech than an opt-in rule. As we have explained (pp. 12-13, *supra*), the choice between an opt-out approach and an opt-in approach, while it may have economic consequences for carriers, does not have any direct effect on a carrier's ability to speak. The court's conclusion that an opt-out approach would be less restrictive appears to have been based on its acceptance of the argument that an opt-in approach would result in fewer approvals and would be more expensive to carry out. But an opt-in rule nonetheless does not prevent a carrier from speaking to anyone in its audience that it could reach under an opt-out rule; under either approach, it is still free to offer all telecommunications services to any of its customers. What a carrier cannot do—under either approach—is use CPNI, without the customer's approval, to identify a particular target audience for services that that audience does not already receive.

we believe generally connotes an informed and deliberate response." *Id.* at 85a. And the FCC determined that "[a]n express approval best ensures such a knowing response." *Id.* at 85a-86a. By contrast, the FCC explained, customers under an opt-out regime might not read their opt-out notices, and opt-out notices might not effectively inform customers of their right to restrict use of CPNI or of the steps they must take to exercise that right; therefore, "there is no assurance that any implied consent would be truly informed." *Id.* at 86a.

The FCC further determined that an opt-in rule would better promote competition than an opt-out regime. An opt-out approach, the FCC observed, would result in a greater percentage of implied "approvals" by customers to use their CPNI and would thus place new entrants at a greater competitive disadvantage vis-à-vis incumbents. The FCC also determined that there was a "greater incentive for carriers to use CPNI under this new statutory scheme, and thus greater potential for abuse." 13 F.C.C.R. at 8134.

2. Despite the serious deficiencies in the decision below, we do not believe that the decision warrants the Court's review at this time. The court of appeals did not purport to invalidate any portion of the 1996 Act. Rather, the court merely vacated a particular regulation, promulgated by the FCC to implement a provision of that statute, because it either was unconstitutional or raised serious constitutional questions in light of deficiencies the court perceived in the administrative record. The majority also did not order the FCC to undertake any particular course of action on remand.

As we read the court of appeals' decision, therefore, it certainly remains open to the FCC on remand to

adopt an opt-out approach to implement Section 222. While that approach may not have been the FCC's preferred implementation of the statute, the court of appeals did not suggest that it would contravene the statute or would be unconstitutional. Nor did the court of appeals express any doubt that if the FCC adopted an opt-out rule on remand, it could require carriers to inform customers of their right to opt out in particularly effective ways, to ensure that customers do not inadvertently lose their right to prevent unlimited disclosure of their private information.

Further, since the principal failing the majority found in the FCC's regulation was an inadequate *factual* justification for the opt-in rule, it may be open to the FCC on remand to readopt such a rule, if it were based on evidence in the administrative record sufficient to satisfy a court's First Amendment scrutiny. It is also conceivable, for example, that upon further consideration, the FCC might conclude that an opt-out rule would suffice for inferring "approval of the customer" for certain limited categories of non-public disclosure but that an opt-in rule would be required for any disclosure exceeding those limitations. Should the FCC on remand either adopt an opt-out rule or develop an expanded record as a basis for again adopting an opt-in rule, or perhaps a hybrid rule, and the new regulation is then challenged in the court of appeals and set aside, the Court may then have occasion to address any constitutional issues raised by restrictions on carriers' use of private customer information, as well as any substantial statutory or regulatory questions that would then be presented. At this point, however, we do not believe the Court's review is necessary.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 99-1427

IN THE
Supreme Court of the United States
OCTOBER TERM 1999

COMPETITION POLICY INSTITUTE,
*Petitioner,*

v.

U S WEST, INC.,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

# BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS IN SUPPORT OF PETITIONER

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## QUESTIONS PRESENTED

1. Whether Federal Communications Commission rules that require local telephone companies to obtain affirmative customer consent before using or disclosing customer proprietary network information ("CPNI") restrict any local telephone company's protected "commercial" free speech under the First Amendment.

2. To the extent such First Amendment rights are implicated, whether the FCC's rules meet this Court's criteria for government regulation of such speech.

## LIST OF PARTIES AND AFFILIATES

Pursuant to Supreme Court Rule 29.6, Petitioner states as follows:

The National Association of Regulatory Utility Commissioners ("NARUC") is supported predominantly by dues paid by its State Public Utility Commission members and through revenues generated by triennial meetings of those members. NARUC has no parent company, subsidiary, or affiliate.

Parties to the case include, MCI Telecommunications Corporation, Airtouch Communications, Inc., Pacific Bell, Sprint Corporation, AT&T Corporation, Nevada Bell, SBC Communications, Inc., BellSouth Corporation, Southwestern Bell Telephone Company, Competitive Telecommunications Association, Frontier Corporation, and Competition Policy Institute.

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IN THE
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COMPETITION POLICY INSTITUTE,
*Petitioner,*

v.

U S WEST, INC.,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## INTEREST OF AMICUS CURIAE[1]

The National Association of Regulatory Utility Commissioners ("NARUC") is a quasi-governmental nonprofit organization founded in 1889. NARUC represents the government officials in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands, charged with the duty of regulating, *inter alia*, the telecommunications common carriers within their respective borders.

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1 In accordance with U.S. Sup. Ct. Rule 37.2(a), 28 U.S.C.A., all parties have consented to the filing of this brief and their letters are on file with the Clerk of the Court. Pursuant to U.S. Sup. Ct. Rule 37.6, 28 U.S.C.A., NARUC states the following: (1) NARUC's General Counsel authored this brief, (2) no counsel for a party to the decision below, or other entity, authored this brief in whole or in part, (3) no person or entity other than NARUC made a financial contribution to the preparation or submission of this brief.

Both the United States Congress and federal courts have recognized that NARUC is a proper party to represent the collective interest of the State regulatory commissions.[2]

The State pubic service commissioners NARUC represents are very concerned by the ruling of the court of appeals presented for review. Although not parties to the original appeal, NARUC's members have a direct and significant interest in its outcome. Specifically, *the 10th Circuit's invalidation of the FCC's CPNI rules on federal constitutional grounds has the potential to circumscribe or otherwise inhibit similar State action on the same or related issues involving both telecommunications and other regulated utilities.* Unless reversed, the 10th Circuit's decision potentially compromises State commission authority to prevent the distribution of utility consumers' personal information without their consent in a variety of contexts.

Moreover, NARUC is concerned about the possible impact of the 10th Circuit decision on the appeals process itself. As Judge Briscoe's dissent strongly suggests, the

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2 See, e.g., 47 U.S.C. § 410 (1986), where Congress calls NARUC "the national organization of the State commissions" responsible for economic and safety regulation of the intrastate operation of carriers and utilities. See, also, *USA v. Southern Motor Carrier Rate Conference, et al.*, 467 F.Supp. 471 (N.D. Ga. 1979), aff. 672 F.2d 469 (5th Cir. Unit "B" 1982); aff. en banc, 702 F.2d 532 (5th Cir. Unit "B" 1983, rev'd, 471 U.S. 48 (1985). See *also Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976).

majority opinion is flawed in both its departures from settled rules of statutory construction and from the proper role of federal courts in assessing the constitutionality of agency rules.[3] The decision (1) misapplies First Amendment jurisprudence to agency action that does not restrict speech by finding that the FCC's CPNI rules regulating the release of consumer information somehow implicates common carriers' commercial free speech rights, and (2) conflicts with this Court's decision in, *inter alia*, *Reno v. Condon*, 120 S. Ct. 666 (2000), which holds that Congress has the constitutional authority to decide that an entity can be barred from disclosing certain information about a person unless it obtains that individual's express consent.

## SUMMARY OF ARGUMENT

The FCC's CPNI rules do not result in an unconstitutional infringement of common carriers' commercial free speech rights. The majority decision expands the 1st Amendment "commercial speech" protections to shelter carriers' commercial exploitation of millions of customers' personal calling habits.

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[3] See, generally, Judge Briscoe's dissent, *U.S. West v. FCC*, 182 F.3d 1224, 1240-1248 (Petitioner CPI's Appendix ["Pet. App."] at 34a-54a) (10th Cir. 1999) where the Judge points out, given the procedural posture of the case, the majority's (1) inappropriate apparent focus on the constitutionality of § 222 of the Act rather than the CPNI order challenged by US West, (*Id.* at 1243-1244, 1245, Pet. App. at 42a-43a, 47a) (2) its flawed analysis of the FCC's review of the opt-out alternative, (*Id.* at 1245-1246, Pet. App. at 50a – 51a) and (3) its faulty use of certain rules of statutory construction., (*Id.* at 1242 –1243, Pet. App. at 41a)

Most of these customers currently have no alternative to their telephone companies' monopoly service. The majority opinion does not address either (1) the fact that the information subject to the FCC's rules belongs to the customers and not to the carriers, or (2) the related argument that the companies thus have no right to use it outside the limited scope of the implied customer consent under which they obtained the information. Moreover, the opinion does not persuasively rebut arguments that the rules do not in anyway restrict the *content* of any carrier communication to a customer.

However, even if one assumes that carriers' First Amendment commercial free speech rights are implicated by the CPNI rules, the restrictions promulgated by the FCC fall well within the range of permissible government action. Commercial speech restrictions are "upheld where the government shows (1) that it has a substantial interest in regulating the speech, (2) that the regulation directly and materially advances that interest and (3) that the interest would not be served as well by more limited restrictions." [4]

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[4] In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York ("Central Hudson")*, 447 U.S. 557 at 564, 566 (1980), the Supreme Court articulates a test to determine when an agency restriction on commercial speech violates the First Amendment. If the subject speech concerns lawful activity and is not misleading, then the government may regulate the speech if it can demonstrate "(1) it has a substantial state interest in regulating the speech, (2) the regulation directly and materially advances that interest, and (3) the regulation is no more extensive than necessary to serve the interest."

As discussed below, the FCC decision meets all three criteria.

## ARGUMENT

The Telecommunications Act of 1996[5] requires all carriers "to protect the confidentiality of proprietary information of . . . customers."[6] Specifically, carriers are precluded from disclosing consumer proprietary network information or "CPNI" received as a result of providing service without customer approval, subject to narrow exceptions.[7] Pursuant to 47 U.S.C. § 222, the FCC promulgated regulations interpreting the statute in the February 26, 1998 *CPNI Order*. See, *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, 63 Fed. Reg. 20,326, 13 FCC Rcd 8061 (1998) (hereinafter "*CPNI Order*").

In *U.S. West, Inc. v. FCC ("US West")*, 182 F.3d 1224 (10th Cir. 1999), the 10th Circuit, in a split decision subsequently upheld on rehearing by another deeply divided panel, invalidated that FCC order.

CPNI include a *customer's* calling records with personal information on who is called, when, for how long, and how often. The *CPNI Order* adopted an opt-in approach – requiring carriers to get a *customer's* express

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5 Pub. L. No. 101-104, 110 Stat. 56. (1996).

6 *Id.* at § 702(a), 47 U.S.C. § 222(a) (Supp. III 1997).

7 *Id.* at § 702(c)(1), 47 U.S.C. § 222(c)(1) (Supp. III 1997).

approval before the company can divulge *that customer's* CPNI, as opposed to an opt-out approach, which requires customers to contact their carrier to prevent it from disclosing *that customer's* CPNI.

The majority's opinion finds the CPNI Order is inconsistent with carriers' First Amendment commercial free speech rights. Utilizing the *Central Hudson* analysis, the Court concluded that even if "the government has asserted a substantial state interest in protecting people from the disclosure of sensitive and potentially embarrassing personal information," and assuming that the CPNI Order directly and materially advanced the State's interest, the regulations were impermissible because they were not narrowly tailored. *U.S. West*, 182 F.3d at 1236. While declining to order the FCC to adopt an opt-out approach, the majority discussed the availability of less burdensome alternatives to the opt-in approach and concluded that "[t]he FCC failed to adequately consider the constitutional implications of its CPNI regulations." *Id.* at 1240.

These determinations must be reversed because the FCC's decision reaches a permissible result under the First Amendment of the U.S. Constitution. Specifically, the conditions for the dissemination of a customer's CPNI by a carrier imposed in the *CPNI Order* do not raise First Amendment commercial free speech issues. Alternatively, to the extent such concerns are raised, the FCC order is consistent with the tests for governmental regulation of such activity established by the U.S. Supreme Court in *Central Hudson Gas & Electric Corp. v. N.Y. PSC*, 447 U.S. 557 (1980).

## I. COMMERCIAL FREE SPEECH CONCERNS ARE NOT IMPLICATED BY THE FCC'S CPNI RULES.

As the FCC noted in the *CPNI Order*, as a threshold matter, it is questionable if the restrictions "even implicate constitutionally protected 'speech.'" 13 FCC Rcd at page 814 ¶ 106. The information that is the subject of the CPNI restrictions is, after all, arguably the consumers', not the carriers'.[8] Both Congress and the courts have recognized consumer's interest in protecting privacy with regard to personal communications.[9] Many *state and federal laws* limit the disclosure of personal information by private entities without implicating the First Amendment. For example, the Fair Credit Reporting Act restricts credit agency release of a consumer's credit report and criminalizes unauthorized disclosures by employees of the

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8 The opinion says, *inter alia*, that *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), *Martin v. City of Struthers*, 319 U.S. 141 (1943), and *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) teach that agencies cannot restrict the speech of either a speaker or his audience in this context, e.g, the CPNI rule infringes carrier's commercial free speech rights. However, those cases are not on point. Each turns on the *method* of communication and *not the use of personal information acquired from business customers to target a particular audience*. The *CPNI Order* does not prevent US West from advertising its services to its customers (*Virginia Pharmacy)* or pamphleteering (*Struthers)* or using direct mail (*Florida Bar)*. All the order prohibits is U S West's nonconsensual use of consumers' confidential data, generated in the course of private activities, to advertise products and services.

9 See, *Edenfield v. Fane*, 507 U.S. 761, 769 (1993)("[P]rotection of potential clients' privacy is a substantial state interest."); *Sheets v. Salt Lake County*, 45 F.3d 1383 (10th Cir. 1995).

consumer-reporting agency.[10] Indeed, aside from the 1996 legislation underlying the rules at issue in this proceeding, Congress has recognized the importance of a citizen's privacy interest in CPNI by enacting other statutes preventing disclosure of the same or similar data. For example, Congress enacted an elaborate statutory scheme to protect the privacy of phone communications, (See 18 U.S.C. §§ 2510-2522 (1994 & Supp. III 1997)), and specifically prohibited the use of pen registers without a court order. See 18 U.S.C. § 3121 (1994). Thus, the Congress has determined that people have a legitimate expectation of privacy with respect to the phone numbers they dial and has decided that this information is so sensitive that it has developed an entire statutory scheme governing law enforcement's ability to collect such data. Similar rules have been established to protect the privacy of cable subscriber records. See 47 U.S.C. § 551 (1994).

## II. EVEN IF WE ASSUME, ARGUENDO, COMMERCIAL FREE SPEECH CONCERNS ARE IMPLICATED BY THE FCC'S CPNI RULES, THE FCC HAS MET THE SUPREME COURT'S CRITERIA FOR GOVERNMENT REGULATION OF SUCH ACTION.

Even if one assumes, arguendo, that carriers' commercial free speech rights are implicated by the CPNI

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10 See *Fair Credit Reporting Act*, 15 U.S.C. § 1681r (Supp. III 1997); see also *Video Privacy Protection Act of 1988*, 18 U.S.C. § 2710 (1994) (prohibiting disclosure of a consumer's video rental records). *See generally* Marc Rotenberg, *The Privacy Law Sourcebook 1999: United States Law, International Law, and Recent Developments* 1-173 (1999).

rules, the FCC action easily meets the relevant Supreme Court criteria for taking such action. In *Central Hudson* at 564, 566, the Supreme Court says government may regulate commercial speech if it can demonstrate "(1) it has a substantial state interest in regulating the speech, (2) the regulation directly and materially advances that interest, and (3) the regulation is no more extensive than necessary to serve the interest."

The majority opinion basically turns on the third prong of the *Central Hudson* test. There is no question that protecting consumers' privacy with respect to sensitive information that is not available in the public domain is a substantial state interest – particularly since Congress segregated it out for separate treatment in the underlying statute. See note 6, *supra*. Nor can it be seriously contended that the CPNI rule adopted directly and materially advances that interest. The majority's opinion however, finds the FCC's rules were not narrowly tailored to advance the government interest. The decision says this "means that the government's speech restriction must signify a 'carefu[l] calculat[ion of] the costs and benefits associated with the burden on speech imposed by its prohibition.'" *US West,* 182 F.3d at 1238 (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993)) (internal quotation marks omitted). The opinion finds that "the FCC's failure to adequately consider an obvious and substantially less restrictive alternative, an opt-out strategy, indicates that it did not narrowly tailor the CPNI regulations." *Id.* at 1238-39.

Both holdings are flawed. A review of the *CPNI Order* reveals significant evidence that the FCC did carefully calculate the costs and benefits associated with both the opt-in approach the agency settled upon and the opt-out approach referenced by the Court's decision.[11] Moreover, after *Central Hudson*, the Supreme Court subsequently determined the least restrictive means test does not apply to commercial speech, finding: [w]hat our decisions require is a "'fit' between the legislature's ends and the means chosen to accomplish those ends," a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served"; that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decision-makers to judge what manner of regulation may best be employed.[12] The *Fox* approach requires an investigation of the legislative history of § 222 to determine Congressional goals and for the agency to make a reasonable determination to advance those goals. We believe that the text of the CPNI Order amply illustrates both Congressional intent to protect consumer's personal information and the needed reasonable fit between that goals and the *CPNI Order*. Moreover, it

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11 The CPNI order contained 30 paragraphs discussing "Approval' Under Section 222(c)(1). *See CPNI Order, 63 Fed. Reg.* 20,329-32, 13 FCC Rcd at 8130-31. Indeed, in ¶ 45, *Id.* at 20,330, the FCC specifically considers and rejects arguments that an express approval requirement violates the 1st amendment.

12 *Board of Trustees v. Fox*, 492 U.S. 469 at 480 (1989); see also *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995).

appears that the opt-in approach adopted by the FCC's CPNI Order reflects Congress's express intent in enacting Section 702 of the Telecommunications Act to protect the privacy of telephone customers. Indeed, this Court explicitly endorsed Congressional authority to create such an opt-in approach in the analogous context of protecting information an individual discloses to her state DMV in *Reno v. Condon*, 120 S. Ct. 666 (2000), decided earlier this Term. [13] For all the reasons stated, we believe the Court should give deference to the agency's findings in this case.[14]

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13 In *Reno*, this Court explicitly upheld a statute that utilizes an opt-in approach to protecting a consumer's personal information. Reno upheld the Driver's Privacy Protection Act of 1994, which prohibits states from disclosing personal information contained in the records of their respective Departments of Motor Vehicles without a driver's express consent. *Id.* The unanimous opinion specifically found that the "sale or release" of the consumer's private information was "in interstate commerce" and "therefore a proper subject of congressional regulation." *Id.* at 671. The FCC's rule's regulating CPNI present a compelling analogous circumstance.

14 In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*, 467 U.S. 837 at 843-4(1984), the Supreme Court found that whenever a court reviews an agency construction of the provision is ambiguous, the court must defer to a reasonable agency interpretation. Note – in the 10th Circuit's opinion, the Court cited an exception to *Chevron* that applies when an agency's construction of a statute raises constitutional issues, 182 F.3d at 1231, but the opinion appears not to apply the more basic canon that courts give a statute a limited construction to avoid the constitutional issue where possible.

## CONCLUSION

For the reasons set forth, supra, NARUC urges the Court to grant the writ of certiorari and reverse the decision of the court of appeals, or alternatively to remand in light of *Reno v. Condon*.

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IN THE
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COMPETITION POLICY INSTITUTE,

*Petitioner,*

v.

U S WEST, INC.,

*Respondent.*

On Petition For Writ of Certiorari To The
United States Court Of Appeals For The Tenth Circuit

**BRIEF OF THE ELECTRONIC PRIVACY INFORMATION CENTER, 14 CONSUMER ORGANIZATIONS, AND 19 LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**


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## INTEREST OF THE AMICI CURIAE

All *amici curiae* represented in this brief have acquired considerable practical experience addressing privacy rights.[1] The ruling of the court of appeals at issue here threatens the personal privacy rights that these *amici* strive to protect. It also conflicts with this Court's decision in *Reno v. Condon*, holding that Congress has the constitutional authority to decide that an organization may be barred from disclosing certain information about a person unless it obtains that individual's express consent.

*Amicus* the Electronic Privacy Information Center ("EPIC") is a public interest research center in Washington, D.C. that was established to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and constitutional values.

*Amicus* AARP is a non-profit organization with more than 33 million members age 50 and older. AARP is greatly concerned about ensuring strong consumer protections in the marketplace and thus supports laws and public policies to protect consumers' privacy rights.

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[1] The parties have consented to the filing of this brief. Their letters are on file with the Clerk of the Court. Pursuant to Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity other than *amici* made a financial contribution to the preparation or submission of this brief.

*Amicus* Center for Center for Media Education ("CME") (Jeff Chester, Director) is a national non-profit organization that works to ensure electronic commerce consumer protections for children and families. In 1998, CME's effort led to the Congressional passage of the Children's Online Privacy Protection Act.

*Amicus* Colorado PIRG ("CoPIRG") is a non-profit, non-partisan consumer advocacy organization with 42,500 members around the state of Colorado. We support efforts, both statewide and nationally, to protect the privacy of our members and of consumers generally.

*Amicus* Computer Professionals for Social Responsibility ("CPSR") (Coralee Whitcomb, President) is a public interest alliance of computer scientists and others concerned about the impact of computer technology on society.

*Amicus* Consumer Action (Ken McEldowney, Executive Director) is an educational and advocacy organization that works on a wide range of consumer and privacy issues impacting low income and limited English speaking consumers.

*Amicus* Consumer Federation of America ("CFA"), established in 1968, represents more than 260 organizations from throughout the nation with a combined membership exceeding 50 million people and works to advance pro-consumer policy on a variety of issues before Congress, the White House, federal and state regulatory agencies, and the courts.

*Amicus* International Communications Association ("ICA") (Brian R. Moir, Counsel) is the largest association of telecom end users in the United States. Its more than 500 members are all users (not vendors) of telecommunications services, and collectively they spend in excess of $32 billion per year on telecom/IS expenses.

*Amicus* Junkbusters (Jason Catlett, President) operates a popular web site on consumer privacy. Junkbusters President Jason Catlett has a Ph.D. in Computer Science; prior to founding Junkbusters he worked on data mining of call detail records for several years at AT&T Bell Laboratories.

*Amicus* Media Access Project (Andrew Jay Schwartzman, President and CEO) is a non-profit public interest telecommunications law firm founded in 1972. It represents the public's First Amendment right to have affordable access to a vibrant marketplace of issues and ideas via telecommunications services and the electronic mass media.

*Amicus* New Mexico PIRG ("NMPIRG") is a non-profit, nonpartisan, consumer advocacy organization with 4,000 members around the state of New Mexico. NMPIRG has supported efforts, both statewide and nationally, to protect the privacy of its members and of consumers generally.

*Amicus* Privacy International ("PI") (Simon Davies, Director General) is an international human rights organization, based in London, England with an

office in Washington, DC and members in over 40 countries. PI advocates for legal and technical measures to protect the right of privacy.

*Amicus* Privacy Rights Clearinghouse ("PRC") (Beth Givens, President) is a non-profit consumer information and advocacy program established in 1992, based in San Diego, California. It advocates for consumers' privacy rights in legislative and regulatory proceedings at the state and federal levels.

*Amicus* Private Citizen, Inc. ("PCI") (Robert Bulmash, President and Founder) was formed in 1988 to protect residents and businesses from the privacy-abusing practices of the direct marketing industry.

*Amicus* U.S. Public Interest Research Group ("U.S. PIRG") is a non-profit, non-partisan consumer, environmental, and good government advocacy organization that serves as the national lobbying office for state PIRGs. U.S. PIRG and the state PIRGs advocate strong privacy laws on behalf of both their more than 500,000 dues-paying citizen members nationwide and consumers generally.

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## SUMMARY OF THE ARGUMENT

I. The decision of the court of appeals undermines basic tenets of an individual's right to privacy under federal law. Citizens have a legitimate expectation of privacy with respect to sensitive personal information such as who they call on a telephone, and a carrier's right to communicate information about products and services does not include the right to build detailed profiles based on personal information obtained through private telephone calls.

II. The FCC's CPNI Order is analogous to numerous other federal laws and regulations implemented to protect citizens' privacy and does not implicate any First Amendment concerns.

III. The opt-in approach adopted by the FCC's CPNI Order reflects Congress's express intent in enacting

Section 702 of the Telecommunications Act to protect the privacy of telephone customers. This Court explicitly endorsed such an opt-in approach in the analogous context of protecting information an individual discloses to her state DMV in *Reno v. Condon*, decided earlier this Term.

## ARGUMENT

### I. THE DECISION OF THE TENTH CIRCUIT PANEL JEOPARDIZES AN INDIVIDUAL'S RIGHT TO PRIVACY.

American jurisprudence recognizes a fundamental right to privacy in personal communications, and both the courts and Congress have recognized the paramount interest a citizen has in protecting her privacy. *See, e.g., Edenfield v. Fane*, 507 U.S. 761, 769 (1993) ("[T]he protection of potential clients' privacy is a substantial state interest."); *Sheets v. Salt Lake County*, 45 F.3d 1383 (10th Cir. 1995). Most recently, this Court held earlier this year in *Reno v. Condon*, ____ U.S. _____, 120 S. Ct. 666 (2000), that Congress can restrict the ability of state departments of motor vehicles ("DMV"s) to disclose personal information about a driver without that driver's express consent. *See id.* at 668-69. Because the decision of the court of appeals in this case fails to recognize an individual's paramount right to keep private her most personal information, this Court should grant certiorari and overturn the court of appeals' ruling or remand it for reconsideration in light of this Court's holding in *Reno v. Condon*.

### A. Individuals Have A Significant Interest In Controlling Distribution Of Their Personal Information And In Preventing Others From Profiting By Its Use.

In *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508 (10th Cir. 1994), the court of appeals recognized that an invasion of privacy is most pernicious when "it is by those whose purpose it is to use the information for pecuniary gain." *Id.* at 1511, 1514. This is exactly the purpose for which Respondent would like to use CPNI -- to target consumers it believes might be interested in purchasing more of its services. The fact that some CPNI, such as a consumer's name and address, may be publicly available is irrelevant, because "[a]n individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." *Department of Defense v. Federal Labor Relations Auth.*, 510 U.S. 487, 500-02 (1994) (finding that unions could not use FOIA to obtain the home addresses of federal employees represented by unions).

In addition, the protections afforded by the FCC's regulation go well beyond concerns with the use or disclosure of publicly available information. The regulation and the underlying statute also protect even more sensitive data about telephone numbers the customer called or from which the customer received a call and the length of the call. As Justice Stewart wrote:

> Most private telephone subscribers may have their own numbers listed in a

> publicly distributed directory, but I doubt there are any who would be happy to have broadcast to the world a list of the local or long distance numbers they have called. This is not because such a list might in some sense be incriminating, but because it easily could reveal the identities of the persons and the places called, and thus reveal the most intimate details of a person's life.

*Smith v. Maryland*, 442 U.S. 735, 748 (1979) (Stewart, J., dissenting).

It is notable that Congress recognized the importance of a citizen's privacy interest by enacting other statutes preventing disclosure of precisely the same information to the public at large. For example, Congress has enacted an elaborate statutory scheme to protect the privacy of telephone communications, *see* 18 U.S.C. §§ 2510-2522 (1994 & Supp. IV 1998), and specifically prohibited the use of pen registers without a court order. *See* 18 U.S.C. § 3121 (1994). Thus, the Congress has determined that people have a legitimate expectation of privacy with respect to the phone numbers they dial and has decided that this information is so sensitive that it has developed an entire statutory scheme governing law enforcement's ability to collect such data. Similar rules have been established to protect the privacy of cable subscriber records, *see* 47 U.S.C. § 551 (1994), video rental records, *see* 18 U.S.C. § 2710 (1994), credit reports, *see* Fair Credit Reporting Act, 15 U.S.C. § 1681 (1994), and medical records, *see* 42 U.S.C. § 290dd-2(a)(1994). *See generally*

Marc Rotenberg, *The Privacy Law Sourcebook 1999: United States Law, International Law, and Recent Developments* 1-173 (1999). The panel's decision fails to accord the proper degree of weight to this valid expectation of privacy.

In contrast to the court of appeals' disregard for personal privacy, this Court earlier this term in *Reno v. Condon* recognized that Congress has the authority to protect an individual's personal information when it upheld the constitutionality of the Driver's Privacy Protection Act, 18 U.S.C. § 2721 (1994 & Supp. IV 1998), which prohibits state DMVs from disclosing personal information about its drivers without their express consent. *See infra* Section III.C.

Further, the FCC's CPNI rule not only protects the privacy interests of telephone customers, but also preserves important values recognized in the First Amendment context, which is the right of telephone customers to decide, freely and without unnecessary burden, when they wish to disclose personal information to others. *See generally Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182 (1999); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960). The ability of individuals to keep private the records of their personal communications also implicates the constitutional interest in not chilling communications between free individuals through the fear of private surveillance. *See NAACP v. Alabama*, 357 U.S. 449, 462 (1958); *see also Smith v. Maryland*, 442 U.S. 735, 751 (1979) (Marshall, J., dissenting).

### B. The FCC's CPNI Order Does Not Unlawfully Restrict Respondent's Right To Communicate With Its Customers.

In its opinion, the court of appeals relied on cases including *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), *Martin v. City of Struthers*, 319 U.S. 141 (1943), and *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), to support the proposition that the government cannot restrict the speech of either a speaker or his audience. However, each of these cases turns on the method of communication and not the use of personal information acquired from business customers. The FCC's Order does not prevent Respondent from advertising its services to its customers per *Virginia Pharmacy* or pamphleteering per *Struthers* or using direct mail per *Florida Bar*. But none of these cases involves a service provider using confidential information to target a particular audience. In *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), for example, this Court upheld certain targeted solicitations by lawyers; however, the attorneys were able to obtain information about their intended audience from public records.

What the FCC's CPNI Order prohibits is Respondent's nonconsensual use of confidential consumer information, generated by customers in the course of their private activities, to advertise products and services. The effect of the decision of the court of appeals is to require essentially captive subscribers to forfeit truly personal information to whatever purpose a telecommunications provider thinks may provide a

commercial benefit. This is an exploitative business practice clothed in the garb of the commercial speech doctrine.

## II. THE FCC'S CPNI ORDER NEED NOT IMPLICATE FIRST AMENDMENT CONCERNS.

Many state and federal laws limit the disclosure of personal information by private entities without implicating the First Amendment. For example, the Fair Credit Reporting Act provides that a credit agency can only release a consumer's credit report under certain conditions and criminalizes unauthorized disclosures by employees of the consumer reporting agency. *See* Fair Credit Reporting Act, 15 U.S.C. § 1681r (Supp. III 1997); *see also* Video Privacy Protection Act of 1988, 18 U.S.C. § 2710 (1994) (prohibiting disclosure of a consumer's video rental records).

In addition, this Court has held unequivocally that a commercial entity that is not a news publication cannot claim full First Amendment protection for the information it includes in a credit report. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985). Such speech receives lesser protection because it is "solely in the individual interest of the speaker and its specific business audience." *Id.* As a commercial entity that desires to use private information it has obtained from its customers for its own pecuniary gain, U S West is entitled to, at most, limited First Amendment protection.

If this Court is prepared to allow a commercial entity to claim a First Amendment interest in the commercial use of private information obtained from its customers, it will call into question virtually every law in the United States that seeks to protect the privacy of consumers. As telephone companies, Internet service providers, and other communications firms acquire ever more detailed information from customers in the course of offering routine communication services, the ruling of the court of appeals could effectively prevent the adoption of legislative safeguards that would preserve the reasonable expectation of privacy in private communications and personal activities that telephone customers currently enjoy.

## III. THE FCC PROPERLY INTERPRETED THE INTENT OF THE CONGRESS BY CHOOSING THE MOST EFFECTIVE MEANS FOR PROTECTING THE PRIVACY INTERESTS OF CONSUMERS.

When Congress enacted section 702 of the Telecommunications Act of 1996, its primary concern was protecting the privacy interests of consumers. Congress did not intend to impede the carrier's ability to communicate with its current or potential customers but rather to insist that confidential information remain protected.

### A. Congressional Intent Makes Clear That § 222 Applies To The Rights Of Customers, Not Carriers.

47 U.S.C. § 222(c)(1) requires a telecommunications carrier to obtain a customer's approval before it can use, disclose, or allow access to that customer's CPNI. *See* Telecommunications Act of 1996 § 702(c)(1), 47 U.S.C. § 222(c)(1) (Supp. III 1997). In its report on the legislation that was eventually enacted as the Telecommunications Act of 1996, the House Commerce Committee explained that the purpose of the protections contained in this section is to balance "the need for customers to be sure that personal information that carriers may collect is not misused" against the customer's interest in ensuring "that when they are dealing with their carrier concerning their telecommunications services, the carrier's employees will have available all relevant information about their service." H.R. Rep. No. 104-204, pt. 1, at 90 (1995).

Respondent's argument that it has a First Amendment right to disclose CPNI is compromised by the fact that customers provide this information with the reasonable expectation that it will be kept confidential and that customers have no choice regarding their carrier's collection of this data. This Court, as well as the court of appeals, has held that if the state possesses extremely personal information about an individual, that individual has a legitimate expectation of privacy with respect to that material, and the government can only disclose it in certain narrow circumstances. *See Nilson v. Layton City*, 45 F.3d 369, 372 (10th Cir. 1995); *see also Whalen v. Roe*, 429 U.S. 589, 599 & n.24 (1977). To be able to disclose such

information, (1) the party asserting the right must have a legitimate expectation of privacy, (2) disclosure must serve a compelling state interest, and (3) disclosure must be made in the least intrusive manner. *See Flanagan v. Munger*, 890 F.2d 1557, 1570 (10th Cir. 1989); *Denver Policemen's Protective Ass'n v. Lichtenstein*, 660 F.2d 432, 435 (10th Cir. 1981).

Although a telecommunications carrier is not the state, applying the *Denver Policemen's* test is instructive. A customer has a legitimate expectation of privacy with respect to CPNI because this data is not publicly accessible. In addition, there is no compelling state interest in promoting CPNI disclosure that could not be served in a less intrusive manner through the opt-in, rather than the opt-out, approach. In either case, the carrier can only reveal CPNI with the customer's consent, and the opt-in approach is least intrusive to the consumer.

### B. Congressional Intent Makes Clear That "Approval of a Customer" Requires An Opt-In Approach.

Section 222(c)(1)'s requirement that a carrier seek a customer's "approval" before disclosing her CPNI demonstrates that the FCC's adoption of an opt-in approach is in line with congressional intent. When the FCC contemplated its order, it primarily considered two options: opt-in and opt-out. Under an opt-in approach, consumers must give the carrier express approval before the company can divulge their CPNI, which, as the FCC explained, "will minimize any unwanted or unknowing disclosure" of the information. CPNI Order at 20,329. With an opt-out

approach, by contrast, customers would receive a notice to sign and return to prevent the carrier from disclosing their CPNI. As the FCC explained, the danger of the opt-out approach is that "because customers may not read their CPNI notices, there is no assurance that any implied consent would be truly informed." *Id.*

*Black's Law Dictionary* defines "approval" as "[t]he act of confirming, ratifying, assenting, sanctioning, or consenting to some act or thing done by another. 'Approval' implies knowledge and exercise of discretion after knowledge." Black's Law Dictionary 102 (6th ed. 1990); *see also* Webster's II New College Dictionary 56 (1995) (defining "approve" as "[t]o confirm or agree to officially"). The opt-out approach fails to satisfy this definition of "approval" because the customer is not confirming or ratifying anything. Under the opt-out approach, consumers may not possess the knowledge that they must affirmatively act to prevent carrier distribution of their CPNI. If they do not have this knowledge, then they cannot exercise discretion regarding it.

The real question before this Court is what the default position should be for consumers who are unaware of their telecommunications carrier's CPNI policies and whether those customers' privacy rights should be protected. With opt-in, the default is that the customer's personal information cannot be disclosed. Under opt-out, the default is that the carrier is free to

disclose this sensitive information.[2] A customer has a reasonable expectation that his personal information will be kept private. This expectation is upset under the opt-out approach, pursuant to which the carrier can sell this data without consulting with the customer. Congress's use of the word "approval" indicates that the default position should favor the uninformed consumer; i.e., if a customer does not sanction the disclosure of his CPNI, then his CPNI should remain confidential. Because "approval" requires an affirmative action by an informed consumer, only the opt-in approach endorsed by the FCC in its CPNI Order satisfies congressional intent. It is the most reasonable fit between Congress's ends and the means chosen to reach those ends.

### C. Congress's Actions In Enacting CPNI Protection Are Directly Analogous To Its Enactment Of The DPPA.

In *Reno v. Condon*, ____ U.S. ____, 120 S. Ct. 666 (2000), decided earlier this year, this Court upheld the Driver's Privacy Protection Act of 1994 ("DPPA"), 18 U.S.C. § 2721 (1994 & Supp. IV 1998), which prohibits

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[2] Although under the opt-out approach the consumer would receive some type of notice or form from his telecommunications carrier explaining what CPNI is and how the carrier would like to use it and instructing the individual to sign and return the form to preclude the carrier's use of this data, the fact is that many consumers will fail to read such an instrument or will misplace it or forget to return it to the company. Thus, there is the danger that a number of customers who do not want their CPNI revealed will fail to contact their carrier to opt-out because they are either forgetful, uncertain, or uninformed.

states from disclosing personal information contained in the records of their respective Departments of Motor Vehicles ("DMV") without a driver's express consent. Chief Justice Rehnquist, writing for a unanimous bench, agreed "that the personal, identifying information that the DPPA regulates is a 'thin[g] in interstate commerce,' and that the sale or release of that information in interstate commerce is therefore a proper subject of congressional regulation." *Id.* at 671. CPNI is also personal, identifying information that is a proper subject of congressional regulation as a thing in interstate commerce. In fact, CPNI is arguably even more personal than the information in DMV records because while DMV records are typically updated only once every few years, each time a citizen renews her driver's license or registers a new vehicle, CPNI is updated constantly, every time an individual makes or receives a phone call.

Even more compelling is the fact that this Court in *Condon* explicitly upheld a regulation that utilizes an opt-in approach. When this Court granted certiorari in *Condon*, the DPPA employed an opt-out approach, pursuant to which the DMV could disclose the driver's information unless the driver objected. *See id.* at 669. By the time the case was argued, Congress had amended the DPPA to require an opt-in approach, so that "States may not imply consent from a driver's failure to take advantage of a state-afforded opportunity to block disclosure, but must rather obtain a driver's affirmative consent to disclose the driver's personal information for use in surveys, marketing, solicitations, and other restricted purposes." *Id.* What is most important is that this Court did not find an opt-

in approach overly restrictive or, as the court of appeals held with respect to CPNI, that the DPPA had to employ the least restrictive means of achieving its end.

## CONCLUSION

For the reasons set forth above, *amici* EPIC and the AARP respectfully urge the Court to grant certiorari and reverse the decision of the court of appeals, or alternatively to remand in light of *Reno v. Condon*.

Respectfully submitted,

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